No. 89-453-CFX
Status: GRANTED

Title: Metro Broadcasting, Inc., Petitioner
v.
Federal Communications Commission, et al.

Docketed:
September 18, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Midlen Jr.,John H.

Counsel for respondent: Solicitor General, Polivy,Margot

Entry	Date	Note	Proceedings and Orders
1	Sep 18 1989	G	Petition for writ of certiorari filed.
3	Oct 17 1989		Order extending time to file response to petition until November 20, 1989.
4	Oct 17 1989		The above extension is for all respondents.
5	Nov 17 1989		Order further extending time to file response to petition until December 5, 1989.
6	Nov 17 1989		The above extension is for all respondents.
7	Dec 5 1989	G	Motion of Competitive Enterprise Institute for leave to file a brief as amicus curiae filed.
8	Dec 5 1989		Brief of respondent Rainbow Broadcasting in opposition filed.
10	Dec 5 1989		Brief of respondent FCC in opposition filed.
9	Dec 6 1989		DISTRIBUTED. January 5, 1990
11	Jan 8 1990		Motion of Competitive Enterprise Institute for leave to file a brief as amicus curiae GRANTED.
12	Jan 8 1990		Petition GRANTED. limited to Questions 1 and 2 presented by the petition. The parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The briefs of the respondents must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.
			**********
13	Jan 26 1990		SET FOR ARGUMENT WEDNESDAY, MARCH 28, 1990. (1ST CASE)
14	Feb 7 1990		Brief amicus curiae of Pacific Legal Foundation filed.
15	Feb 9 1990		Brief amicus curiae of United States filed.
16	Feb 9 1990		Brief amicus curiae of Galaxy Communications, Inc. filed.
17	Feb 9 1990		Brief amicus curiae of Jerome Thomas Lamprecht filed.
18	Feb 9 1990		Brief amici curiae of Mountain States Legal Foundation, et al. filed.
20	Feb 9 1990		Brief amicus curiae of Associated General Contractors of America, Inc. filed.
21	Feb 9 1990		Brief amicus curiae of Washington Legal Foundation filed.
22	Feb 9 1990		Joint appendix filed.
23	Feb 9 1990		Brief of petitioner Metro Broadcasting, Inc. filed.
24	Feb 9 1990		Brief amici curiae of ACLU, et al. filed. VIDED.
19	Feb 12 1990		Record filed.
		*	Certified copy of original recoord, 63 volumes, received. (Box).
25	Feb 26 1990	G	Motion of respondent Rainbow Broadcasting Company for divided argument filed.

2 pgs

No. 89-453-CFX

Entry	Date	Note	Proceedings and Orders
26	Mar 2 1990		CIRCULATED.
31	Mar 5 1990	X	Brief of respondent Rainbow Broadcasting filed.
27	Mar 6 1990	X	Brief amici curiae of National League of Cities, et al. filed.
28	Mar 6 1990	X	Brief amicus curiae of Giles Television, Inc. filed.
29	Mar 6 1990	X	Brief amicus curiae of Capital Cities/ABC, Inc. filed.
30	Mar 6 1990	X	Brief of respondent FCC filed.
32	Mar 6 1990	X	Brief amici curiae of Cook Inlet Region, Inc., et al. file
33	Mar 6 1990	X	Brief amici curiae of Congressional Black Caucus, et al. filed.
34	Mar 6 1990	X	Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
35	Mar 6 1990	X	Brief amicus curiae of National Bar Association filed.
36	Mar 6 1990	X	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
37	Mar 6 1990	X	Brief amicus curiae of American Women in Radio and Television, Inc. filed.
38	Mar 6 1990	X	Brief amicus curiae of United States Senate (TBP) filed.
39	Mar 6 1990	X	Brief amici curiae of American Jewish Committee, et al. filed.
40	Mar 6 1990	X	Brief amici curiae of Natl. Association of Black Owned Broadcasters, Inc., et al. filed.
41	Mar 9 1990	X	Brief amicus curiae of United States Senate filed.
42	Mar 12 1990		Lodging received.
44	Mar 16 1990	X	Reply brief of petitioner Metro Broadcasting, Inc. filed.
43	Mar 19 1990		Motion of respondent Rainbow Broadcasting Company for divided argument GRANTED.
45	Mar 28 1990		ARGUED.

89-453 (1)

No.

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September, 1989

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QUESTIONS PRESENTED FOR REVIEW

The Federal Communications Commission decides most of its comparative broadcast licensing cases on but five meaningful criteria, one of which is race or ethnicity and one of which is gender.

The questions presented for review are:

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988 and 1989 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principles embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

3. Whether the doctrine of *stare decisis* requires that a prior decision by a panel of a federal appellate court must be followed by subsequent, same-circuit, panels in later cases where reasoned analysis, especially in light of intervening Supreme Court pronouncements, compels the conclusion that the earlier panel was in error.

LIST OF PARTIES

The parties in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (consolidated case nos. 85-1755 and 85-1756) were appellants Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park), appellee Federal Communications Commission, intervenors Rainbow Broadcasting Company (Rainbow), City of Winter Park and Winter Park Chamber of Commerce, and amicus curiae United States of America.

PARTIES' STRUCTURES

Metro and Winter Park are privately held corporations. Neither has any parent, subsidiary or affiliated corporations. Rainbow is a general partnership.

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IN THE

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OCTOBER TERM, 1989

No.

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Metro Broadcasting, Inc. (Metro) petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals or lower court) to review the decision and judgment in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (2-1 decision) (*Winter Park*), denying review of a decision of the Review Board of the Federal Communications Commission (Commission or FCC), which awarded a construction permit for a new UHF television station at Orlando, Florida to Rainbow Broadcasting Company (Rainbow) and denied the competing application therefor of Metro.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 873 F.2d 347 (D.C. Cir. 1989) and is reproduced in Appendix

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[1] The application of Winter Park Communications, Inc. (Winter Park) also was denied for reasons not here relevant. (App. B at 90a).

(App.) A at 1a. The Decision of the Review Board granting the application is published at 99 FCC 2d 688 (Rev. Bd. 1985) and is reproduced in Appendix B at 64a. The Commission's Order denying review of the Review Board's Decision is unpublished but is reproduced in Appendix B at 60a. The Commission's Memorandum Opinions and Orders while on remand are published at 2 FCC Rcd 1474 (1987) and 3 FCC Rcd 866 (1988) and are reproduced, respectively, in Appendix B at 52a and 48a.

JURISDICTION

The Opinion (App. A at 1a) and Judgment (App. C at 94a) of the Court of Appeals were entered on April 21, 1989, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc*. (App. A at 47a). The order denying Metro's petition for rehearing was entered June 21, 1989 (App. C at 96a), as was the order denying Metro's suggestion for rehearing *en banc* (App. C at 98a).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment thereto and Sections 1 and 5 of the Fourteenth Amendment thereto. Their texts are set forth in Appendix D at 100a.

The germane sections of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982) *codified at* (47 U.S.C. §§ 309(i)(3)(A) - (4)(A)), are set forth in Appendix D at 102a.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987) are reproduced in Appendix D at 100a.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth in Appendix D at 101a.

STATEMENT OF THE CASE

Metro, petitioner, filed an application for a construction permit for a new television station on Channel 65 at Orlando, Florida, in 1982. Rainbow, respondent, filed a competing application later that year, and the two mutually exclusive applicants[2] were pitted against one another in the crucible of a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended.[3] Because Rainbow received enhancement credits for its attributable 90% Hispanic and 5% female (included within the Hispanic attribution) ownership composition, it ultimately prevailed under the Commission's minority and gender preference scheme. (App. A at 6a; App. B at 50a, 61a, 87a and 88a).

Racial and Gender Preferences in the Commission's Comparative Process[4]

In comparative licensing proceedings for new broadcast stations, the Commission is charged by statute with following the "public convenience, interest, or necessity." 47

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[2] The application of Winter Park was designated for hearing in the same proceeding, but as is reflected in note 1, supra, the issue Winter Park raised below is not germane to the proceedings before this Court. Also designated for hearing in the same proceeding was the application of Orlando Family Television, Ltd., which voluntarily was dismissed by the applicant while still before the Administrative Law Judge.

[3] 47 U.S.C. § 309(e) (1982).

[4] Certain sections of the Statement of the Case are taken from the Brief for the United States as Amicus Curiae in the court below, and the Brief for the Federal Communications Commission on Hearing *En Banc* in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir.) (September 12, 1986).

U.S.C. § 307(a). *See also* 47 U.S.C. § 309(a). Pursuant to this mandate, the Commission has adopted certain standard criteria which are considered in every comparative proceeding. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (the *1965 Policy Statement*). The Commission explained in its *1965 Policy Statement* that the two main goals governing its selection among qualified applicants were: (1) to achieve the best practicable service to the public; and (2) to effect maximum diffusion of control of the media of mass communications, generally referred to as diversification. Id. at 394.

As originally set forth in the *1965 Policy Statement*, the selection criteria for comparative analysis were race-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *reconsideration denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 FCC 2d 559 (1972), *rev'd, TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). Only an applicant's "experience, background, and knowledge of the community" were deemed appropriate qualitative factors to consider under the "best practical service" criterion. 495 F.2d at 936.[5] However, in *TV 9*, the District of Columbia Circuit rejected the Commission's argument that the "the 'Communications Act, like the Constitution, is color blind,'" holding instead that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. *Id.* at 938. Subsequently, in *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the same Circuit refused to accept the Commission's view that a racial preference should be

[5] In the *TV 9* proceeding the Review Board had held, and the Commission affirmed, that "[b]lack ownership cannot and should not be an independent comparative factor * * *; rather, such ownership must be shown on the record to result in some public interest benefit." 33 FCC 2d at 18.

awarded only where an applicant demonstrates a nexus between race and increased program diversity, declaring that race presumptively would promote such diversity when minority owners are integrated into the management of the proposed station.[6]

Based on these directives, the Commission concluded that minority ownership and participation should receive credit in the comparative process and decided that a preference would be awarded to minority applicants under the "best practicable service" criterion in Commission hearings. *WPIX, Inc.*, 68 FCC 2d 381 (1978). Subsequently, the Commission developed two other policies designed to promote minority ownership of broadcast facilities through preferences.[7] They are the *distress sale policy*, which allows a broadcaster whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority-owned, or minority-controlled purchaser, and a policy of affording *tax certificates* to sellers of media properties where the purchaser is minority-owned or minority-controlled. The distress sale policy has fallen as unconstitutional.[8]

The FCC's Review Board first extended the minority preference to female applicants in *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on*

[6] *Id.* at 1063.

[7] *Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce* (Oct. 2, 1986).

[8] Only three weeks before a panel of the Court of Appeals for the District of Columbia Circuit decided this case, a different panel of the same court, in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 901 (D.C. Cir. 1989)(2-1 decision), struck down the Commission's distress sale policy. Rehearing *en banc* was denied in that case, as in *Winter Park*. It is expected that the Commission will petition for certiorari in *Shurberg*.

other grounds, 87 FCC 2d 203 (1981). The Commission later acquiesced in the Board's decision.[9] The gender preference was challenged in *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985), where a panel held that "the Commission exceeded its authority under the Federal Communications Act by adopting a female preference in comparative broadcast proceedings." *Id.* at 1199. However, the circuit, sitting *en banc*, vacated the panel decision, granted rehearing and called for rebriefing.[10]

The Commission's Reexamination of its Preferences in *Steele*

In *Steele, en banc*, the Commission concluded that both its gender and minority preference policies were indefensible on the record as it stood. Before the *en banc Steele* court, the Commission submitted a motion for remand with its brief on the merits, and concurrently released a Public Notice, FCC 86-387 (Sept. 15, 1986) (App. E at 106a), announcing its actions. In its brief, the Commission admitted that it "had neither constitutional authority nor statutory basis for the female preference," and asked that the court remand the matter for further consideration. The Commission proclaimed in its motion for remand that "race, sex or national origin *per se* should not be a basis for licensing determinations," and expressed its disbelief in the proposition that "a sufficient foundation [existed] to satisfy statutory review requirements or the heightened scrutiny the Constitution requires of racial or gender based preferences." Through its Public Notice, the Commission announced that it would be "looking at this issue and instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*," *Public Notice*

[9] *E.g., Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601, 602-03 (1984).

[10] As explained *infra* at n.18, Steele never reached an *en banc* Circuit decision.

(App. E at 107a.), and reiterated its opinion that "racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an 'exceedingly persuasive justification' " (citing *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)) (App. E at 107a).

As recounted in *Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (App. B at 48a), the court remanded *Steele* to the Commission "in order to permit the agency to reexamine the bases for its minority and female preference policies." The record in this case was remanded for the same purpose, *id.*, as was the record in *Shurberg*. 876 F.2d at 927 (MacKinnon, J., concurring in judgment). In due course, the Commission, by *Notice of Inquiry*, opened MM Docket No. 86-484, encaptioned *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), *modified*, 2 FCC Rcd 2377 (1987) (*Racial, Ethnic or Gender Classifications* or *Inquiry*).[11] Evidence was collected from numerous interested parties, but the *Inquiry* was doomed on December 22, 1987, when the President signed *House Joint Resolution 395* into law. *Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988); *Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-102, 101 Stat. 1329 (1987) (*1988 Appropriations Act*) (App. D at 100a).

The *1988 Appropriations Act*, which contained the funding legislation for the Commission for fiscal year 1988, directed the FCC, *inter alia*, "to close MM Docket No. 86-484 with a reinstatement of prior policy . . ." with re-

[11] Pending completion of the *Inquiry*, the Commission ordered that action be deferred in all cases in which the award of racial, ethnic or gender preferences would be dispositive of the outcome. 1 FCC Rcd at 1319. The instant case was among those held in abeyance. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) (App. B at 52a).

spect to "minority and women ownership of broadcasting licenses . . . ." *1988 Appropriations Act* (App. D at 100a). Similar language was incorporated into the appropriations legislation for fiscal year 1989. *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (December, 1988) (*1989 Appropriations Act*). (App. D at 101a). Following the enactment of the *1988 Appropriations Act*, the Commission ceased the *Inquiry*, decided those cases held in abeyance pursuant to its order therein, and began to reapply its minority and female preferences in comparative proceedings. *E.g., Faith Center, Inc.*, 3 FCC Rcd 868 (1988); *Metro Broadcasting, Inc.* 3 FCC Rcd 866 (1988) (App. B at 48a).

The Mechanics of Integration and the Application of the Commission's Preferences in the Instant Proceeding

Diversification of ownership of the mass media, the second of the Commission's standard comparative criteria, is of such overwhelming importance, *e.g., FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 697 (1978), that it is seldom, if ever, a factor in comparative rankings. Under the diversification criterion, ownership interests in other mass communications media push an applicant below its starting point in the comparative evaluation. *WPIX, Inc.*, 68 FCC 2d at 385. As the Commission's Review Board said, "an applicant having no other attributable mass media interests will all but certainly prevail over a party with such interests." *Newton Television, Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), *modified* 4 FCC Rcd 2561 (1989) (citing eight prior cases). Accordingly, the Commission's licensing decisions almost invariably turn on the second factor, "best practicable service," under which the predominant consideration is the quantitative degree to which new station owners are proposed to be integrated into management (most applicants seek 100% credit or close to it), incorporating consideration of certain qualitative enhancements that elevate the applicant for comparative purposes. *WPIX, Inc.*, 68 FCC 2d 381.

Not surprisingly, this case was decided on the "best practicable service" criterion. The Review Board awarded Metro a "79.2% full-time plus 19.8% part-time quantitative integration credit" and Rainbow a "90% full-time credit." 99 FCC 2d at 703 (App. B at 86a). Quantitative credit is calculated by determining the voting ownership interest of each integrated principal and totaling them as to each category, *i.e.*, full-time, substantial, and part-time. Rainbow's quantitative advantage was not sufficient to be decisional. In circumstances where that is the case, the Commission turns, as it did here, to "qualitative attributes."[12]

Qualitative attributes, or enhancement factors, are the heart of this case. They are scant in number[13] thus each, where present, takes on enormous importance. The enhancement factors are: (1) minority status; (2) female status; (3) local residence; (4) civic activity within the service area, and (5) past broadcast experience. The two most important factors are local residence and minority status. Indeed, they are co-equal.[14] Female status is entitled to somewhat less weight than minority status,[15] but the exact weight accorded female status is uncertain. Civic participation is considered as part of a proposed owner's local residence background, and thus is close on the heels of the foregoing in terms of importance.[16] Past broadcast ex-

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[12] *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd.), *reconsideration denied*, 89 FCC 2d 631 (1982).

[13] *Racial, Ethnic or Gender Classifications*, 1 FCC Rcd at 1315.

[14] *E.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985); *Linda Crook*, 3 FCC Rcd 354 (1988).

[15] *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).

[16] *1965 Policy Statement*, 1 FCC 2d at 396.

perience is a distant last and seldom serves any function other than that of a tie breaker.[17]

The Commission's application of minority and female preferences in the instant case was dispositive. Metro prevailed on the local residence and civic participation qualitative attributes. However, the Review Board concluded that "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage (5% vs. Metro's 0%) and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage." 99 FCC 2d at 704 (App. B at 88a). On remand, discussed *supra* at 6-7, the Commission acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." *Metro Broadcasting, Inc.*, 2 FCC Rcd at 1475 (App. B at 56a).

Prior to its appeal to the District of Columbia Circuit under 47 U.S.C. § 402(a) (1982), and before the *Winter Park* and *Steele* remands, Metro petitioned the full Commission for review. The Commission's denial of Metro's entreaty (App. B at 62a) transformed the decision of the Review Board into that of the Commission, pursuant to Section 155 of the Communications Act of 1934. 47 U.S.C. § 155(c)(3). With *Racial, Ethnic or Gender Classifications* closed down by the congressional appropriations legislation, *Winter Park*, on Metro's motion, was recalled by the Court of Appeals, rebriefed, argued and decided.[18]

Between oral argument and decision, this Court decided *City of Richmond* v. *J. A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*), which should have influenced the lower court's ruling. Recognizing this, Metro timely lodged a Supple-

[17] *Id.*

[18] *Steele* was not decided post-remand, nor will it ever be, as the case has been settled. *James U. Steele*, 4 FCC Rcd 4700 (1989).

mental Brief with the court. However, Metro's motion for leave to file its Supplemental Brief was denied and the brief rejected. (App. E at 104a).

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Involves Important Issues Of Constitutional Law That Ought To Be Resolved By This Court.

This case presents the Court with several issues of first impression regarding the constitutionality of government sponsored race-, ethnic- and gender-based classifications in the context of the minority and female preferences routinely applied by the FCC in its comparative hearing process. This Court has addressed the constitutionality of governmental race-based preference classifications thrice before,[19] and those cases portend the ultimate arrival of the issues raised herein. *Fullilove* examined racial classifications imposed by *Congress*, discussing the standard of equal protection review applicable to congressional race-based remedial measures enforced against the States and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472-92 (Burger, C.J., writing for the plurality). *Wygant*, and the more recent *Croson*, shed light on the disposition of cases in which race-based remedies are imposed by a *state* or *local* government without evidence of identified past discrimination, and enunciate criteria for properly tailoring race-based remedies where evidence of such identified discrimination is present. *Webster* v. *Reproductive Health Services*, 109

[19] *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*).

S.Ct 3040, 3064 (1989) (Scalia, J., concurring in part). However, the Commission's preference classifications, which (1) arose as a federal agency's response to judicial directives; (2) are administered and applied by the agency, rather than Congress or state or local government; (3) were created in the absence of any evidence of past discrimination or nexus between remedy and objective, and (4) have been entrenched by subsequent congressional legislation despite the agency's attempts to reexamine or repeal them, fit snugly in the gaps left by this Court's prior decisions and evade clear resolution under current equal protection review standards. This Court's evaluation of the Commission's preference scheme could resolve many unsettled issues in the complex area of equal protection review and reach, for the first time, elements therein relating to federal agencies.

The Decision Below

The lower court's determination that the FCC's racial, ethnic and gender[20] preferences withstand constitutional scrutiny was based almost entirely upon the same court's previous ruling in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 604-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Judge Edwards, writing for the majority, stated in *Winter Park*'s opening paragraph that, "this case is clearly controlled by *West Michigan* . . .," 873 F.2d at 349 (App. A at 2a), and concluded that "our prior decision in West Michigan controls the disposition of the case with respect to the FCC's use of a qualitative enhancement for minority ownership." 873 F.2d at 356 (App. A at 17a). The lower court's majority opinion merely tracks the reasoning first advanced in *West Michigan*, noting that governance of the cases on which *West Michigan* relied—*Fullilove* and *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978)—remains intact, despite more recent

[20] The lower court defaulted on gender. See note 22, *infra*.

Supreme Court decisions. 873 F.2d at 353-55 (App. A at 10a-15a).

The *West Michigan* Rationale

When the Court of Appeals decided *West Michigan*, two of this Court's precedents were deemed critical to the constitutionality of the Commission's award of minority-based preferences: *Fullilove* and *Bakke*. *West Michigan*, 735 F.2d at 613; *Winter Park*, 873 F.2d at 354 (App. A at 12a). Yet the *West Michigan* court declined to undertake "a detailed or lengthy inquiry into the exact contours of the approaches taken in . . . those cases." 735 F.2d at 613. Instead, Judge J. Skelly Wright, announcing the opinion of the court, casually declared that "a *number* of factors show that the FCC's plan easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches." *Id.* (emphasis added).

In fact, *West Michigan* specified only two factors in support of its conviction that the FCC's minority preference policy was constitutionally firm: (a) that consideration of minority status was but "one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters," 735 F.2d at 613, and (b) that Congress, in passing legislation directing the Commission to incorporate preferences for minority applicants into any random selection licensing scheme adopted to replace the comparative hearing process,[21] recognized the "extreme underrepresentation of minorities and their perspectives in the broadcast mass media." 735 F.2d at 613-14.

The court determined that the first factor validated the minority preference classifications under Justice Powell's

[21] *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982) (*codified* at 47 U.S.C. §§ 309(i)(3)(A)-(4)(A)), reproduced in Appendix D at 102a.

approach in *Bakke*, drawing an analogy between Justice Powell's approval, in principle, of the use of race as a factor in the educational admissions process for the purpose of obtaining diverse student bodies, and the FCC's use of a minority preference to further its goal of attaining diverse broadcast programming, on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (quoting *1965 Policy Statement*, 1 FCC 2d at 394 n. 4). The second factor, presence of congressional action, was found dispositive under Fullilove, as the court stated "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *Id.* at 615. Judge Wright concluded that

> Under *Fullilove*, Congress can clearly adopt such race-conscious policies to assure that current allocations do not perpetuate race-based disparities derived from past discrimination. And an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns.

Id. at 616.

West Michigan's dual rationale for affirming the constitutionality of the Commission's preference classifications was adopted by the majority in *Winter Park*, 873 F.2d at 356 (App. A at 17a and 18a), notwithstanding that any remedial purpose was vehemently disclaimed by the Commission. 873 F.2d at 356 n.1 (App. A at 18a) (Williams, J. dissenting). Yet, the *West Michigan* decision, if ever sound, would appear to have been undermined by subsequent pronouncements in *Wygant*, 476 U.S. 267, and *Croson*, 109 S.Ct. 706. Moreover, neither *West Michigan* nor *Winter Park* reviewed the constitutionality of the Commission's gender-based preference policy, which must be

addressed in this case.[22] A ruling from this Court is needed to break the lock fastened by *stare decisis* in the D.C. Circuit, and to determine whether the Commission's preference policies have a valid constitutional basis.

Program Diversity as a Compelling Governmental Interest

The *West Michigan* and *Winter Park* courts' references to the Commission's diversity rationale in support of the constitutionality of its minority-based preferences raise hitherto dormant issues regarding the application and expansion of reasoning first advanced by Justice Powell in *Bakke*, 438 U.S. 265, and again by Justice O'Conner in *Wygant*, 476 U.S. 267. Additionally, neither the *West Michigan* nor the *Winter Park* opinion discusses whether the Commission's preference policies are narrowly tailored to achieve its objectives. Accordingly, review by this Court is needed to determine: (a) whether the "diversity" rationale, first advanced in *Bakke*, has valid application with respect to the Commission's race-, ethnic- and gender-based classifications; (b) whether program diversity, as employed by the FCC, is a compelling governmental interest under

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[22] The *Winter Park* majority noted, in footnote 5 to its opinion, 873 F.2d at 353, n.5 (App. A at 10a), that "the Commission determined below that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation. *See* 3 FCC Rcd at 867 n.1. Accordingly, we consider only the legality of the FCC's use of a qualitative enhancement for minority ownership."That language came on remand. not upon the Commission's denial of review, which said the same thing. Pursuant to 47 C.F.R. Section 115(g) the Commission could have granted in part and denied in part Metro's Application for Review. It chose to deny, thereby invoking Section 155(c)(3) of the Communications Act, notwithstanding note 5 to the *Winter Park* majority opinion. The Commission's text accompanying denial of review, (App. B at 60a), including its remark that Rainbow's female preference was not decisional, is but dicta. Moreover, whether *failure* to consider gender would not have altered the result is irrelevant. What is relevant is what happened and the legal consequences thereof.

the prevailing strict scrutiny standard of review, independent of any attempt to remedy past discrimination, and (c) if so, whether the Commission's preference classifications are narrowly tailored to achieve that interest.

Metro, along with The United States, as *amicus*, urged the court below to hold that governmental classifications by race and gender are subject to strict scrutiny and that the Commission's policy is not narrowly tailored.[23] The *Winter Park* majority, as Judge Wright in *West Michigan*, did neither—avoiding the subjects altogether. The majority of this Court apparently now believes that racial classifications, whether purportedly "remedial," or "benign," must be subjected to strict scrutiny review when faced with an equal protection attack.[24] To survive such analysis, (1) a racial or gender classification must be justified by a "compelling governmental interest," and (2) the means chosen by the governmental unit to effectuate its purpose must be "narrowly tailored." *Wygant*, 476 U.S. at 274, 285; *Croson*, 109 S.Ct at 721-22 (quoting *Weinberger* v. *Wiesenfield*, 420 U.S. 636, 648 (1975).

Metro questions whether the promotion of program diversity is a compelling governmental interest. This Court clearly has held that the federal government has a compelling interest in remedying past racial discrimination and/or its lingering effects. *Wygant*, 476 U.S at 286. "In *Ful-*

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[23] Brief for the United States as Amicus Curiae at 11-13 and 28-32; Metro Brief at 24 and at Oral Argument.

[24] *See Wygant*, 476 U.S. at 273-74 (Powell, J., joined by Burger, C.J., Rehnquist, J. and O'Connor, J.); *id.* at 285 (O'Conner, J., concurring in part and concurring in the judgment); *Croson*, 109 S.Ct at 721 (Part III-A, O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 735 (Scalia, J. concurring); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *see also Croson*, at 752 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (noting this as a novel aspect of the decision).

lilove, six members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement." *Croson*, 109 S. Ct. at (Marshall, J., dissenting). Additionally, although its application remains untested, this Court has held that a state interest in the promotion of racial diversity was sufficiently compelling to support the use of racial considerations in furthering that interest, at least in the context of higher education. *Bakke*, 438 U.S. at 311-15; *Wygant*, 476 U.S. at 286. And, Justice O'Connor suggested in *Wygant*, that additional interests might be considered by this Court:

> [N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id.

Both *West Michigan* and *Winter Park* treated the FCC's diversity goal as analogous or identical to the objective embraced by Justice Powell in *Bakke*. *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 354 (App. A at 13a). Metro, however, posits that the "diversity" interest advanced by the Commission in its comparative hearing context is much different from the "diversity" interest hypothetically approved in *Bakke*, and should be reviewed by this Court before receiving routine application in lower courts as an interest justifying race-, ethnic- and gender-based classifications.

The Commission has characterized its race-, ethnic- and gender-based preference policies as an attempt to "enhance *program diversity* by increasing ownership of stations by significant groups that are substantially underrepresented in station ownership." *FCC Brief in*

Winter Park at 47 n. 47 (quoted in *Winter Park*, 873 F.2d at 357 (Williams, J., dissenting)) (App. A at 19a) (emphasis added). However, programming diversity appears to be amorphous, undefined even by its proponent. Only the origins of the concept provide a clue as to its meaning. Apparently, the rationale is an extension of the idea, first presented by the D.C. Circuit in *TV 9, Inc.* v. *FCC*, 495 F.2d at 938, and *Garrett* v. *FCC*, 513 F.2d at 1063, that diversity of station ownership will bring about diversity of programming. *See Winter Park*, 873 F.2d at 363 (Williams, J., dissenting) (App. A at 32a, 33a). In plain English, "program diversity" means different kinds and types of programming.

"Program diversity" and the "academic diversity" outlined by Justice Powell in *Bakke* would not appear to serve as interchangeable justifications for government imposed racial, ethnic and/or gender classifications. The different contexts from which the two goals arise would seem to render meaningful comparison impossible. For example, Justice Powell found that academic diversity was tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create its own diverse student body was deemed important for exposing students to the "atmosphere of 'speculation, experiment and creation' " deemed "essential to the quality of higher education." *Id.* at 323. This unique academic goal would not seem to have a counterpart in the Commission's race-, ethnic- and gender-based preference policies. Judge Silberman, writing for a different panel of the D.C. Circuit in *Shurberg*, found the analogy between the two goals "wanting":

> It is simply unacceptable, in my view, to say that the government has a role in educating the general public through television broadcasts that is parallel to its interest in promoting diversity in the educational setting. That is a somewhat Orwellian notion. Through public education, the government has assumed a special function in preparing our youth for participation in society. . . . But there is no indication that Justice Powell contemplated that his reasoning would extend beyond the distinctive context of education where the state legitimately engages in a form of indoctrination.

876 F.2d at 920 n. 27.

Another distinction between Justice Powell's academic diversity rationale and the Commission's program diversity goal is that the pursuit of academic diversity in the manner advocated by Justice Powell tends to break down racial stereotypes, whereas the Commission's indirect pursuit of program diversity through the promotion of minority and female ownership perpetuates them. As Judge Williams stated in his *Winter Park* dissent, "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device *against* ethnic stereotyping." 873 F.2d at 357 (App. A at 21a). Conversely, the Commission's ownership promotion policies are based on the "reasonable expectation"[25] that minority owners will program in some sort of minority manner. Under the Commission's theory, race, ethnicity and gender not only determine what type of programming station owners want to provide, but also what viewers and listeners want to hear. *See Id.* at 358 (App. A at 21a). This appears to be exactly the type of racial stereotyping that the *Croson* majority identified as a preeminent danger in the use of racial classifications. *See Croson*, 109 S.Ct at 721; *id.* at 730-34 (Stevens, J., concurring); *id.* at 735, 739 (Scalia, J., concurring).

Numerous contrasts render acceptance of the Commission's preference classifications under the *Bakke* diversity

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[25] *TV 9, Inc.*, 495 F.2d at 938 ("Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors").

rationale problematic, if not impossible. Accordingly, this Court's ruling is necessary to determine the extent to which Justice Powell's rationale may be expanded to encompass the use of "diversity" as a compelling governmental interest outside the academic admissions context.

Notwithstanding the applicability or nonapplicability of the *Bakke* diversity rationale to the instant case, however, programming diversity, by itself, would not appear to be a compelling government interest because the government neither can ensure nor enhance it: the marketplace does that. And, the marketplace apparently is working. The Commission itself concluded in *Deregulation of Radio*,[26] that "all types of minority needs, be they racial, ethnic or taste, can be and indeed are being well met through increasing the number of stations." *Id.* at 1068. As the Commission explained:

> [L]icensees have come to the conclusion that, even where the group appealed to has traditionally . . . had a low income or is low in number, marketplace forces make the provision of radio service to these segments of the community a rational economic decision.

Id.

Similar conclusions were reached in *Commercial TV Stations*, 98 FCC 2d 1076 (1984), *reconsideration denied*, 104 FCC 2d 357 (1986), *aff'd*, *Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, even were program diversity a valid governmental interest, it could not be "compelling" because according to the governmental entity advancing the interest, it already has been, and is being, achieved.

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[26] 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd in part and rev'd in part*, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F. 2d 1413 (D.C. Cir. 1983).

Narrow Tailoring and the FCC's Minority and Gender Ownership Promotion Policies

Assuming, *arguendo*, that the Commission's goal of program diversity constitutes a compelling government interest, strict scrutiny review requires that the means chosen to effectuate this goal be "narrowly tailored" to its accomplishment. *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. This "narrow tailoring" aspect of strict scrutiny review was not applied to the Commission's preference classifications by either the *West Michigan* court, or the majority in *Winter Park*, and never will be, due to the continuing grip of *West Michigan*, absent the intervention of this Court.

Application of the narrow tailoring prong of heightened or strict scrutiny review to the Commission's preferences fails to yield the conclusion that the Commission's minority and female ownership promotion policies are even reasonably, much less narrowly, tailored to fulfill its program diversity goal.[27] First, the Commission itself has declared that program diversity already exists or is assured by the marketplace. Thus, an indirect attempt to promote such diversity by awarding ownership preferences would appear unnecessary for, or unrelated to, the accomplishment of, program diversity. Second, the Commission's own concession that there is no record to demonstrate that the use of "a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving

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[27] Accordingly, it is doubtful whether the Commission's preference policies could withstand review under the standard advocated by Justice Marshall in *Wygant*, that use of race as a classification is permissible if it (1) serves important government objectives, and (2) is substantially related to achievement of those objectives. 476 U.S. at 302 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting). The Commission's ownership promotion policies do not appear to be substantially related to the achievement of program diversity.

that objective," *FCC Steele Brief*, at 19,[28] renders inconceivable the notion that the Commission's policies are narrowly tailored; indeed, they would appear to have no rational basis. Third, as Judge Williams points out in his *Winter Park* dissent, "[n]o party here has offered a definition of minority programming that is empirically verifiable . . . ." 873 F.2d at 358 (App. A at 22a). Ergo, the lack of a clear definition of program diversity hampers any conclusion that racial, ethnic or gender ownership composition promotes it. Fourth, the Commission has admitted it has no evidence "on which to base an assumption that a nexus exists between an owner's race or gender and program diversity." *FCC Steele Brief*, at 19. This admission would appear to destroy any claim of narrow tailoring; the Commission is uncertain even of the logic underlying its preference awards. Fifth, even if the Commission's policies promote program diversity despite its own apparent evidence to the contrary, the Commission does not appear to have considered race-neutral alternatives that can avoid the stereotyping resulting from its "reasonable expectation" that certain owners inherently broadcast specific types of programs. Finally, to the extent that the Commission's policies are designed to correct the "underrepresentation" of certain viewpoints by awarding preferences to specific groups until true program diversity is achieved, they would seem either to be unlimited in duration, or to constitute a quota. *See Winter Park*, 873 F.2d at 360 (Williams, J., dissenting) (App. A at 26a).

In sum, review by this Court is needed because evidence of narrow tailoring with respect to the Commission's minority and gender preferences is sadly lacking, and the lower courts have refused to conduct this portion of strict scrutiny analysis.

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[28] Notably, the brief was adopted by the commissioners themselves (App. E at 106a) rather than consisting of the usual *post hoc* rationalizations of government counsel.

The Presence of Congressional Action and the *Fullilove* Standard

Apparently, the reason that neither the *West Michigan* nor *Winter Park* panels undertook a complete, strict scrutiny equal protection review of the Commission's minority and female preference policies was their determination, based upon this Court's holding in *Fullilove*, that "any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goal and means." *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 355 (App. A at 15a). For the *West Michigan* court, this "approval" was expressed by Congress' passage of § 115 of the *Communications Amendments Act of 1982*,[29] designed to facilitate the development of a random lottery system as an alternative to the Commission's comparative process. The legislation required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission. *Id.* The *Winter Park* majority found additional legislative acquiescence in the *1988* and *1989 Appropriations Acts*.[30] Both courts implied that the mere presence of the enactments provided ample grounds for treating the Commission's preferences as if they had been imposed by Congress directly, and upholding them as a valid exercise of the remedial powers accorded Congress under § 5 of the Fourteenth Amendment, pursuant to this Court's rationale in *Fullilove*. *West Michigan*, 735 F.2d at 613-16; *Winter Park*, 873 F.2d at 354 (App. A at 14a-15a).

This Court's recent decision in *Croson* raises serious questions as to whether the *Fullilove* rationale is applicable

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[29] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (*codified* at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (App. D at 102a).

[30] The court observed that "Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership. . . ." *Winter Park*, 873 F.2d at 355 (App. A at 14a).

to the FCC's preference classifications. *Croson*, for the first time, makes clear that *Fullilove*'s review standard may be employed only in connection with race-based remedial measures undertaken by *Congress*, pursuant to its unique constitutional responsibility to enforce the Equal Protection Clause against the states. *Croson*, 106 S.Ct at 718, 719, 726. Application of that standard in the instant case is problematic. First, the Commission has eschewed the notion that its preference policies have any remedial basis,[31] and both the congressional lottery legislation and appropriations acts appear to be based upon the promotion of program diversity rather than the imposition of a remedial rationale upon the agency.[32] Second, the presence of congressional action sufficient to invoke the more deferential *Fullilove* standard of review is dubious. The Commission's preferences, which developed as an agency response to *judicial* directives, had been in effect for *ten years* before Congress enacted the *1988* and *1989 Appropriations Acts*, and the 1982 legislation relied upon in *West Michigan* did not even pertain to the Commission's comparative hearings.[33] Finally, the specific justification presented in *Fullilove* for application of a more deferential review standard—Congress' authority, under § 5 of the Fourteenth Amendment to curtail or correct *state* discrimination based on race, *Croson* 109 S.Ct at 719-20,—is wholly absent here, where the policies at issue were formulated and applied by a *federal agency* and no evidence of past discrimination by the agency has been proffered.

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[31] *Winter Park*, 873 F.2d at 353 n.6 (majority opinion) (App. A at 11a); *id.* at 356, 362, 363 (Williams, J., concurring in part and dissenting in part) (App. A at 18a, 31a, 33a).

[32] *See* discussion in *Winter Park*, 873 F.2d at 363-65 (Williams, J. concurring in part and dissenting in part) (App. A at 34a-38a).

[33] Metro notes that only the lottery legislation had been enacted when it first applied for the proposed Orlando station in 1982, and questions whether congressional enactments following that date may be lawfully construed herein.

If, notwithstanding the above, *Fullilove* is deemed applicable here, issues remain which have yet to be addressed by the Court, the most important of which are (a) whether the objective of promoting program diversity provides sufficient constitutional basis for congressional race-, ethnic- and/or gender-based legislative measures, absent evidence of identified discrimination; (b) what level of congressional participation is required before a court must invoke the *Fullilove* review standard; (c) whether, and to what extent Congress' § 5, Fourteenth Amendment power may be expanded and used to constrain agency action, as well as action by the states, and (d) whether the entrenchment of the FCC's minority and female preference policies constitutes a narrowly tailored, constitutional means for achieving Congress' diversity objectives. Clarification is needed to allay the confusion which remains following the *Croson* decision and to apply, for the first time, some of the reasoning initially suggested therein.

2. The Lower Court's Determination That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Is Inconsistent With The Rationale And Result Reached By A Different Panel Of The Same Circuit Three Weeks Earlier And Involves An Important Issue Of Judicial Policy With Respect To Intracircuit *Stare Decisis* Which Ought To Be Resolved By This Court.

Croson acknowledged confusion in the lower courts regarding the appropriate standard for equal protection review. Opening in *Croson*, Justice O'Connor noted that some federal courts had applied the *Fullilove* standard in assessing the constitutionality of state and local minority set-aside programs, whereas others employed *Wygant*'s strict scrutiny approach. *Croson*, 106 S. Ct. at 712. Unfortunately, whereas *Croson* clarified both the *Fullilove* and strict scrutiny standards by enumerating certain circumstances in which the use of each is appropriate, confusion

still reigns, particularly with respect to applications not discussed by this Court due to the *Fullilove, Wygant* and *Croson* factual scenarios.

This confusion has been felt in the D.C. Circuit, as two separate panels, in *Winter Park*, and *Shurberg*, have grappled with the application of this Court's precedents to the FCC's preference policies, each reaching opposite conclusions. Judge Silberman's comments on behalf of the *Shurberg* majority are illustrative:

> [I]in [the] aftermath [of *Bakke, Fullilove, Wygant*, and *Croson*] I would be less than candid not to concede that discerning and applying constitutional principles in this area is difficult; in none of the first three cases does a majority of the Court join any one opinion. Under these circumstances, a lower federal court must do its level best to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations.

876 F. 2d at 910.

Similar frustrations were expressed by Judge Williams in *Winter Park*, 873 F.2d at 366 (App. A at 41a), and Judge MacKinnon in *Shurberg*. 876 F.2d at 928.

Between *Shurberg* and *Winter Park*, five opinions sprung forth—three finding constitutional fault and two finding constitutional validity. Four displayed valiant efforts to come to grips with the novel constitutional issues presented in the two cases, notwithstanding the holding in *West Michigan*. One, however, the majority opinion in *Winter Park*, dodged the constitutional issue, claiming fealty to *West Michigan* notwithstanding the intervening *Wygant*, 476 U.S. 267, and *Croson*, 109 S. Ct. 706.

Former Commission Chairman Patrick exclaimed his bafflement at the inconsistency between *Shurberg* and *Winter*

Park, particularly in light of *Wygant* and *Croson*. *Commission Files Petition for Rehearing* en banc *in* Shurberg *v.* FCC, 4 FCC Rcd 4511-12 (1989) (Dissenting Statement of Chairman Dennis R. Patrick) (App. E at 111a). He was of the opinion that *Shurberg* and *Winter Park* should have been considered together so that "the court could give us definitive guidance." *Id.* at 4512 (App. E at 112a).

It is evident from the strong criticism of *West Michigan* by Judges Silberman, MacKinnon and Williams in the two conflicting decisions that a reasoned analysis of *West Michigan* would have led to the conclusion that it was decided erroneously, especially in light of subsequent decisions of this Court undermining it. *West Michigan* should not have been followed blindly in the name of intracircuit *stare decisis*. This Court should so proclaim, thereby freeing subsequent panels in all circuits to meet their obligation to decide cases as they view the law, leaving reconciliation or interment to the particular circuit *en banc*.

CONCLUSION

The Commission has been delegated responsibility for determining the public interest in the field of electronic communications. It developed criteria based upon this mandate and implemented them in a race-neutral manner. The D.C. Circuit concocted the racial preference. The FCC dutifully submitted until this Court's decisions required that it exercise its own judgment. Congress stepped in, notwithstanding its earlier delegation, and, through the Appropriations Acts, emasculated the Commmission's efforts. Judge Silberman, in *Shurberg*, noted "not only has Congress prevented the FCC from attempting to muster factual support for a position that it conceded was impermissible on the present record, but it has placed the FCC in a situation where it was obligated to disregard an

order of this Court." 876 F.2d at 925 n.39. Chairman Patrick has felt the full brunt of this whipsaw and has cried out for relief from the void created. *Dissenting Statement*, 4 FCC Rcd at 4511 (App. E at 110-111a).

For the foregoing reasons, the requested writ of certiorari should issue.

Respectfully submitted,

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September, 1989

APPENDICES

APPENDIX A

[873 F.2d 347]

WINTER PARK COMMUNICATIONS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

Rainbow Broadcasting Company, Metro Broadcasting, Inc., Winter Park Chamber of Commerce and City of Winter Park,
Intervenors.

METRO BROADCASTING, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

Rainbow Broadcasting Company and Winter Park Communications, Inc.,
Intervenors.

Nos. 85-1755, 88-[sic]1756.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 21, 1988.
Decided April 21, 1989.

• • •

[873 F.2d 349]

Before EDWARDS and WILLIAMS, Circuit Judges, and

FRIEDMAN,* Circuit Judge, United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Opinion concurring in part and dissenting in part filed by Circuit Judge STEPHEN F. WILLIAMS.

HARRY T. EDWARDS, Circuit Judge:

In these consolidated cases, Metro Broadcasting, Inc. ("Metro") and Winter Park Communications, Inc. ("Winter") seek review of an order of the Federal Communications Commission ("FCC" or "Commission") awarding Rainbow Broadcasting Company ("Rainbow") a license to operate a UHF television station in Orlando, Florida. Winter argues that the Commission erred in refusing to award it a dispositive preference under section 307(b) of the Communications Act for providing the first local television service to the City of Winter Park, Florida. Metro raises a number of grounds of error, contending principally that the Commission violated the equal protection clause of the Constitution in giving Rainbow credit for minority ownership. On the record before us, we find that the Commission's application for section 307(b) was consistent with FCC precedent. We also find that this case is clearly controlled by *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1027, 105 S.Ct. 1392, 84 L.Ed.2d 782 (1985), in which this court expressly held that the FCC's use of an enhancement for minority status "easily passes constitutional muster." *Id.* at 613. Accordingly, we deny the petitions for review.

I. BACKGROUND

On February 26, 1982, following a rulemaking proceeding, the FCC assigned a new UHF television channel to

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

the City of Orlando, Florida. *Amendment of § 73.606(b), Table of Assignments*, 50 Rad. Reg.2d (P & F) 1714 (1982). Under the Commission's then-existing "15-mile rule," the channel was available for use in communities located within fifteen miles of Orlando.[1] Petitioners Metro and Winter and intervenor Rainbow filed mutually exclusive applications for use of the channel. Metro and Rainbow designated Orlando as their place of license, and Winter specified the neighboring City of Winter Park, but all three applicants proposed to serve the entire Orlando metropolitan area, including Winter Park.

When parties file mutually exclusive applications for use of a broadcast channel in different localities, the Commission first determines whether any of the applicants is entitled to a preference under 47 U.S.C. § 307(b) (1982) for providing first or second local service to a community.[2] If one applicant receives a section 307(b) preference over the others, then that applicant normally will prevail without a comparative hearing. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135 (D.C.Cir.1985). If no community is entitled to a section 307(b) preference, or if more than one applicant specifies the preferred community, the Commission then conducts a comparative hearing to evaluate the qualifications of the [**873 F.2d 350**] competing appli-

[1] The rule has since been repealed, *see The Suburban Community Policy*, 93 F.C.C.2d 436, 451-53 (1983), and parties may now apply for use of a channel only in the locality to which it has been assigned. Thus, the section 307(b) inquiry now takes place in the initial rulemaking proceeding to assign the channel to a community, before the channel is open for applications from interested parties.

[2] Section 307(b) requires the Commission "to provide a fair, efficient, and equitable distribution" of broadcast service among states and communities. This provision instructs the FCC to "creat[e] a system of local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.' " *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174, 88 S.Ct. 1994, 2003, 20 L.Ed.2d 1001 (1968) (quoting H.R.Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962)).

cants. *See, e.g., Buena Vista Telecasters,* 94 F.C.C.2d 625, 628 (Rev.Bd.1983).

In a comparative hearing, the Commission weighs both "quantitative" and "qualitative" factors. The quantitative assessment rests on the applicant's proportional integration of ownership into management. If one applicant has a clear quantitative advantage, then that applicant receives the station (assuming that the applicant is otherwise qualified and does not own other media interests). *See, e.g., WHW Enterprises, Inc.,* 89 F.C.C.2d 799, 819 (Rev.Bd.1982), *rev. denied,* FCC 83-368 (Sept. 15, 1983), *aff'd in part and rev'd in part on other grounds,* 753 F.2d 1132 (D.C.Cir.1985). If no applicant has a clear qualitative advantage, then the Commission assesses the applicants' relative strengths on a variety of qualitative factors, including minority ownership, local residence, civic participation, and prior broadcast experience. These qualitative enhancements cannot, however, overcome clear quantitative differences. *See WHW,* 89 F.C.C.2d at 817.

After Metro, Winter and Rainbow filed their applications, the proceeding was assigned to an administrative law judge ("ALJ"), who issued a decision awarding the channel to Metro for use in Orlando. *Metro Broadcasting,* 96 F.C.C.2d 1073 (1983) (Miller, ALJ). The ALJ found that neither the City of Winter Park nor Orlando was entitled to a preference under section 307(b), because the Commission had assigned the channel to the Orlando *area,* Winter Park was "an integral part of the Orlando Urbanized Area," and the center of Winter Park was less than five miles from the center of Orlando. *Id.* at 1087. The ALJ then evaluated the qualifications of the applicants themselves, and disqualified Rainbow for "lack of candor" in its application. Of the remaining two applicants, the ALJ found that Metro had a ninety-nine to ten percent quantitative advantage over Winter and that this advantage, together with Metro's various qualitative enhancements, made Metro an "overwhelming comparative winner" over Winter. *Id.* at 1088.

Winter and Rainbow appealed to the FCC's Review Board ("Board"), which reversed the ALJ on the lack-of-candor issue and awarded the channel to Rainbow.[3] 99 F.C.C.2d 688 (Rev.Bd.1984). The Board agreed with the ALJ that Winter Park was not entitled to a section 307(b) preference. However, the Board reduced Metro's integration credit and found that Rainbow's resulting quantitative advantage was "probably a 'clear' enough difference to be decisional." *Id.* at 703. The Board also concluded, however, that Rainbow was ahead qualitatively. The Board reviewed a number of factors, emphasizing that Rainbow had 90% hispanic ownership participation, whereas Metro had only one 19.8% partner who was black. Overall, the Board concluded:

> [A]lthough the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civil [sic] participation advantage.

Id. at 704.

Winter and Metro appealed to the Commission, which declined review of the Board's decision largely without discussion, stating merely that it "agree[d] with the Board's resolution of this case." FCC 85-558, slip op. at 2 (Oct. 18, 1985). Winter and Metro appealed to this court.

After the cases had been briefed and were awaiting oral argument, the Commission initiated a separate nonadjudicatory proceeding to explore its constitutional and statutory authority for awarding comparative preferences

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[3] Neither Winter nor Metro has sought review of the determination on lack-of-candor.

based on race and gender. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986) (*"Reexamination"*). We then granted the FCC's request for remand to allow the Commission to reexamine whether Rainbow would have [**873 F.2d 351**] received the station absent its preference for minority ownership. On remand, the Commission found that Rainbow had no clear quantitative advantage and that deletion of Rainbow's minority preference could reverse the outcome of the case. 2 F.C.C. Rcd. 1474, 1475 (1987). Accordingly, the Commission ordered the proceeding held on abeyance pending further action in the *Reexamination* proceeding on use of minority preferences.

On December 22, 1987, President Reagan signed into law the continuing resolution for fiscal year 1988, Pub.L. No. 100-202, 101 Stat. 1329 (1987). That resolution contained a provision forbidding the FCC from using any of the appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its policies to expand minority and female ownership of broadcasting licenses. 101 Stat. at 1331. Congress also ordered the FCC to reinstate prior policy and to lift the suspensions of all proceedings that had been held pending the conclusion of the *Reexamination* proceeding. *See id.* In compliance with this legislation, the Commission reactivated the case and reaffirmed its earlier order upholding the Board's decision to grant Rainbow's application. 3 F.C.C. Rcd. 866 (1988). Thus, the appellants' earlier appeals were reinstated.

II. ANALYSIS

A. Section 307(b)

Winter challenges the finding that it was not entitled to a dispositive preference under section 307(b) of the Communications Act. Orlando currently has five licensed television stations and Winter Park has none, although all

five Orlando stations are received in Winter Park. The parties do not dispute that Winter Park is a city separate and distinct from Orlando. Consequently, Winter argues, the community of Winter Park has a greater need for local broadcast service than does Orlando, and FCC and court precedent require the Commission to accord Winter a dispositive 307(b) preference over the other applicants. We disagree.

In refusing the grant Winter a section 307(b) preference, the Board relied on the FCC policy of defining "community" more broadly in television cases than in radio cases. When a television station is sought:

> "In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term 'communities,' as used in [section 307(b)] of the Communications Act, is not limited in meaning to 'municipalities' but may include metropolitan areas."

Metro, 99 F.C.C.2d at 697 (quoting *St. Louis Telecast, Inc.*, 22 F.C.C. 625, 713 (1957)); *accord Cleveland Television Corp.*, 91 F.C.C.2d 1129, 1136 (Rev.Bd. 1982). In such situations, the city and the suburb comprise a single community, and neither receives a preference over the other under section 307(b).

The Board's decision to deny Winter a section 307(b) preference was fully consistent with this urbanized area policy. All three applicants proposed to place a Grade B signal over the Orlando metropolitan area, including all of Winter Park. Thus, the Board found that there was no reason to award Winter a section 307(b) preference, because all applicants would be serving the same region. *See* 99 F.C.C.2d at 698.

Winter's claim that the Commission has no such urbanized area policy is without merit. The Commission ac-

knowledges that it has applied this policy somewhat erratically in radio cases, *see e.g., Debra D. Carrigan*, 100 F.C.C.2d 721, 725, *reconsid. denied*, 101 F.C.C. 2d 218 (Rev.Bd.1985), *rev. denied*, 104 F.C.C.2d 826 (1986); however, in television cases, there is no doubt that the FCC consistently has refused to grant a suburban community a section 307(b) preference over a central city when all applicants propose area-wide service.[4] [873 F.2d 352] *See, e.g., Cleveland*, 91 F.C.C.2d at 1136; *Buena Vista*, 94 F.C.C.2d 625; *Knoxville Broadcasting Corp.*, 59 Rad.Reg.2d (P & F) 1617, 1622-23 (Rev.Bd.1986); *Charles Vanda*, 8 Rad.Reg.2d (P & F) 427, 433-34 (Rev.Bd.1966); *St. Louis Telecast*, 22 F.C.C. at 627-30.

Moreover, this court has previously found that it is permissible for the Commission to define "community" differently in the radio and television contexts so as to avoid a section 307(b) analysis when wide-area television coverage is proposed. *See New Radio Corp. v. FCC*, 804 F.2d 756, 760 (D.C.Cir.1986). The FCC has broad discretion under section 307(b) to determine the public interest, *see Loyola Univ. v. FCC*, 670 F.2d 1222, 1226 (D.C.Cir.1982), and nothing in the Communications Act prevents the FCC from defining the term "community" differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries, *see e.g., National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1198

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[4] Winter notes that the Commission proposed to adopt its urbanized area policy in a rulemaking proceeding but has not done so. *See The Commission's Policy, Pursuant to Section 307(b) of the Communications Act, of Granting Comparative Preferences Within Metropolitan Areas*, 48 Fed. Reg. 19,428 (1983). Yet, neither has the Commission rejected the proposal; in fact, it has indicated that it will continue to apply the metropolitan area policy on a case-by-case basis until it takes further action in the rulemaking proceeding. *See Debra D. Carrigan*, 100 F.C.C.2d at 731 n. 19 (citing its authority under *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), to proceed case-by-case rather than by rulemaking).

(D.C.Cir.1984) (upholding FCC approval of cable TV licenses on a nationwide basis and stating that "the constituency to be served is people, not municipalities").

Contrary to Winter's contention, the FCC's refusal to grant a section 307(b) preference to a smaller suburban community over a central city has little to do with the relative sizes of the competing communities or with the type of television station—VHF or UHF—being sought. Rather, the Commission's policy in the distribution of television licenses is based on the characteristics of that medium:

> Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artifical political boundaries." *Evening Star Broadcasting Co.*, 27 FCC2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316 (D.C.Cir.1972).

Cleveland, 91 F.C.C.2d at 1137, *quoted in Metro*, 99 F.C.C.2d at 698. Moreover, the Commission has often invoked its urbanized area policy in cases involving UHF licenses. *See e.g., Cleveland*, 91 F.C.C.2d 1129; *Washington's Christian Television Outreach, Inc.*, 99 F.C.C.2d 395, 408-10 (Rev.Bd.1984); *Adell Broadcasting Corp.*, 99 F.C.C.2d 477, 508-10 (Rev.Bd.1984).

In the present case, the Review Board found that "the economic need of a television station to attract sizeable advertising revenues to cover the significant costs involved in its ongoing operation creates a strong presumption—unrebutted in this record—that each applicant will serve the entire Orlando metropolitan area." 99 F.C.C.2d at 698.

The Commission's refusal to award Winter a section 307(b) preference was thus fully consistent with its existing policy regarding award of television licenses to competing applicants in the same metropolitan area.

B. Enhancement for Minority Ownership

Metro, Winter, and the Department of Justice as amicus curiae argue that the Commission's use of a qualitative enhancement for minority ownership violates the equal protection clause of the Fifth Amendment.[5] Although minority ownership is [**873 F.2d 353**] only one of several factors considered by the FCC in awarding broadcast licenses, it may tip the balance in some cases. The issue is before us in this case because the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive. *See* 2 F.C.C.Rcd. at 1475.

The issue regarding the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved because this case is controlled by our decision in *West Michigan*, 735 F.2d 601. In considering exactly the same policy at issue here, the court in *West Michigan* ruled that "the FCC's plan easily passes constitutional muster," *id.* at 613, for at least two reasons:

> In our analysis two factors stand out as particularly important to our conviction that there is no constitutional infirmity in the FCC's behavior. First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consid-

[5] Metro also challenges the use of gender preferences. However, the Commission determined below that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation. *See* 3 F.C.C. Rcd. at 86, n. 1. Accordingly, we consider only the legality of the FCC's use of a qualitative enhancement for minority ownership.

> eration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media. Congress found that this situation was a part of "the effects of past inequities stemming from racial and ethnic discrimination." H.R.Conf.Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982), U.S.Code Cong. & Admin.News 1982, p. 2287. Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure. In giving special weight to these factors we in no way imply that either would be essential to the constitutionality of a government affirmative action program, but their presence places the program's constitutionality beyond question.

Id. at 613-14 (emphasis in original).[6]

Since the decision in *West Michigan*, the Supreme Court has reviewed several challenges to race and gender preferences in employment.[7] However, none of the Court's

[6] Unlike Congress, the FCC does not now base its policy of enhancement for minority ownership on a purpose to cure the effects of perceived racial discrimination. *See* Brief for FCC at 29-30. Rather, the FCC has indicated that its policy is designed to increase the participation of minority groups in the broadcast industry "in furtherance of the public interest goal of diversity of viewpoint—to enhance the public's exposure through programming on broadcast stations to the viewpoints of the significant, diverse groups that make up the nation." *Id.* at 30; *see Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-15, 98 S.Ct. 2733, 2759-61, 57 L.Ed.2d 750 (1978) (plurality opinion of Powell, J.); *West Michigan*, 735 F.2d at 614 (noting that "[t]he FCC policy would clearly be validated under Justice Powell's approach" in *Bakke*).

[7] *See generally* Edwards, *The Future of Affirmative Action In Employment*, 44 WASH. & LEE L.REV. 763 (1987); Jones, *The Genesis and*

recent cases has undermined the holding in *West Michigan*. Indeed, even the Justice Department has conceded that *West Michigan* controls the dispositon of this case.

The Supreme Court's recent decision in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), does not alter this conclusion. In *Richmond*, the Court found that the City of Richmond had violated the equal protection clause by requiring prime contractors for the city to subcontract at least 30% of the dollar amount of their construction contracts to one or more minority business enterprises. A review of the Court's opinions, however, makes clear that *Richmond* does not significantly alter the constitutional framework underlying this court's decision in *West Michigan*. [873 F.2d 354]

The *West Michigan* court, in upholding the FCC's use of a qualitative enhancement for minority ownership, relied primarily on the Supreme Court's earlier decisions in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), and *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). *See West Michigan*, 375 F.2d at 613. Neither of these decisions was repudiated by the Court in *Richmond*. A majority of the Court—the three justices who joined part II of Justice O'Connor's opinion for the Court, and the three dissenters—continues to regard *Fullilove*, in which the Court upheld a congressional program creating a 10% minority set-aside for federal construction contracts, as good law. *See Richmond*, ___ U.S. at ___-___, 109 S.Ct. at 717-20 (plurality opinion); *id.* at ___-___, 109 S.Ct. at 750-52 (Marshall, J., dissenting); *see also id.* at

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Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities, 70 IOWA L.REV. 901 (1985); Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV.L.REV. 658 (1989); Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV.L.REV. 78 (1986).

-___, 109 S.Ct. at 735-38 (Scalia, J., concurring in the judgment) (declining to revisit *Fullilove*). Indeed, Justice O'Connor relied heavily on the reasoning of *Fullilove* and was careful to point out why the facts of *Richmond* compelled a different result. *See* ___ U.S. at ___-___, 109 S.Ct. at 717-20, 728-29. Similarly, none of the opinions in *Richmond* expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination. *See Bakke*, 438 U.S. at 311-15, 98 S.Ct. at 2759-61 (plurality opinion). Accordingly, the constitutional foundation for *West Michigan* remains intact.[8]

Moreover, the Supreme Court in *Richmond* stressed two crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in *Richmond*, and in both respects the FCC's policy is more similar to the *Fullilove* program found constitutional than to the *Richmond* plan.

First, the Court emphasized that the Richmond plan involved "an unyielding racial quota," ___ U.S. at ___, 109 S.Ct. at 724, in contrast to "the flexible nature of the 10% set-aside" upheld in *Fullilove*, *id.* at ___, 109 S.Ct. at 718. The FCC's policy, however, is even more flexible than the *Fullilove* set-aside plan: it does not in-

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[8] Most of the Supreme Court's other recent cases involving challenges to affirmative action have upheld the legality of these plans in the employment context. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d. 615 (1987); *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed. 2d 203 (1987); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). The only notable exception has been *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). Together, these cases surely do not undermine this court's decision in *West Michigan*. Furthermore, none of these cases calls into question either *Fullilove* or *Bakke*.

volve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses. In fact, the Commission would not even have considered minority ownership if it had found that the City of Winter Park was entitled to a dispositive preference over the City of Orlando under section 307(b).

Second, the *Richmond* Court made a distinction between programs enacted by Congress and those adopted by states or local governments. The Court observed that the *Richmond* plan was adopted by a city council, which had no specific constitutional mandate to enforce the Fourteenth Amendment; rather "[s]ection 1 of the Fourteenth Amendment is an explicit *constraint* on state power." ___ U.S. at ___, 109 S.Ct. at 719 (emphasis in original). The plan upheld in *Fullilove*, by contrast, was passed by Congress, which has "unique remedial powers . . . under § 5 of the Fourteenth Amendment." *Richmond*, ___ U.S. at ___, 109 S.Ct. at 718. In reviewing a congressional program, the Court emphasized,

> "we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that *in no organ of government, state or federal,* [873 F.2d 355] *does there repose a more comprehensive remedial power than in the Congress,* expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." [*Fullilove,*] 448 U.S., at 483, 100 S.Ct. at 2777 (plurality opinion) (emphasis added).

Richmond, ___ U.S. at ___, 109 S.Ct. at 718.

Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses. *See* Pub.L. No. 97-259, § 115, 96 Stat. 1087, 1094-95, *codified at* 47 U.S.C. § 309(i)(3)(A), (C)(ii) (1982) (mandating use of minority preferences in lottery assignments); Pub.L. No. 100-204, 101 Stat. at 1331 (continuing resolution). "Any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615.

The FCC has indicated that it intends to adhere to its policy and we have no authority to overturn the agency's judgment on this point. *West Michigan* disposed of the constitutional challenges to the use of enhancements for minority ownership, and we are bound to follow this law of the circuit. *See Brewster v. Commissioner*, 607 F.2d 1369, 1373 (D.C.Cir.), *cert. denied*, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979).

C. Other Issues

Aside from the section 307(b) and constitutional issues, which were the main arguments on which the parties focused in oral argument and in the briefs, Metro also raised a number of other arguments that we find to be moot or to lack merit.

First, Metro argues that the Commission erred in its assessment of Metro's and Rainbow's comparative quantitative integration of ownership into management. However, the Commission in fact agreed with Metro that the ALJ gave Metro too little credit for one of its partners, and the Commission rejected the ALJ's finding that Rainbow's quantitative advantage over Metro was probably decisive. *See* 2 F.C.C. Rcd. at 1475. Rather, the Commission found that neither party had a clear quantitative advantage over the other. *See id.* Although the Commission did not go as far as Metro would like and thus did not find that Metro had a quantitative advantage over Rainbow, the Commission's determination is entitled to considerable deference, *see Office of Comm'n of the United Church of Christ v. FCC*, 707 F.2d 1413, 1424-25 (D.C.Cir.1983), and we

find nothing in the record to suggest that it should be overturned.

Metro also contends that the 1987 continuing resolution, which directed the FCC to resolve the present case within sixty days in a manner consistent with the Commission's existing policies, was an unconstitutional bill of attainder. However, "[t]he proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group." *Selective Serv. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851, 104 S.Ct. 3348, 3354, 82 L.Ed.2d 632 (1984). Metro has made no argument that Congress' action imposed punishment on Metro. Although part of the same continuing resolution aimed at one individual, Robert Murdoch, was found unconstitutional in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C.Cir.1988), the court in that case found that Congress had denied Murdoch a waiver that was available to all other applicants. In the present case, by contrast, Congress simply ordered the FCC to adhere to established substantive policies in resolving broadcast license disputes; Congress did not purport to instruct the agency how to decide any particular case on the merits. Congress neither singled out Metro nor directed that Metro be punished, and the continuing resolution was therefore not a bill of attainder as applied to Metro.[9] [873 F.2d 356]

III. CONCLUSION

We find that the Commission's refusal to accord Winter a dispositive preference under section 307(b) was consist-

[9] The other issues raised by Metro are moot. Metro argues that it should have been awarded "substantial" rather than "moderate" credit for local residency, and that Rainbow should not have been given a substantial preference over Metro for broadcast experience. The Commission indicated, however, that neither of these issues affected the outcome of the proceeding. *See* FCC 85-558 (Oct. 18, 1985); 2 F.C.C.Rcd. at 1475. Metro's charges against Winter are also moot, as we have upheld the Commission's determination that Winter was not entitled to the station.

ent with its previous interpretations of that section. We also find that our prior decision in *West Michigan* controls the disposition of the case with respect to the FCC's use of a qualitative enhancement for minority ownership. Accordingly, the petitions for review are denied.

So ordered.

STEPHEN F. WILLIAMS, Circuit Judge, concurring in part and dissenting in part:

I am in full agreement with the majority's treatment of Winter Park's § 307(b) claim and of the issues addressed in part II.C. of the opinion. I dissent from the majority's constitutional analysis. The critical factor inducing the Commission to award the license to Rainbow was that its 90 percent credit for Hispanic ownership outweighed Metro's 19.8 percent credit for black ownership. Although in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir.1984), our circuit found it constitutional for the Commission to make race pivotal in the allocation of a radio channel, I believe that case has been largely undermined by the Supreme Court's more recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), and *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

The Commission and intervenors on its side assert two possible constitutional justifications for the FCC's minority preference policy. First, the FCC claims that its policy fosters diversity in broadcast programming, a "non-remedial" purpose. See FCC Brief at 29-31. I do not believe the justification can survive the *Croson* Court's analysis, particularly its indictment of racial stereotyping. Second, Rainbow claims that the FCC's policy is also designed as a remedy for the effects of "historical underrepresentation of minorities in broadcasting," independently of any link to broadcasting diversity. See Rainbow Brief at 22 and generally at 21-26.[1] As the Commission itself never articulated this remedial theory, the theory cannot sustain the decision here unless Congress mandated Commission use of racial preferences even in the event of the collapse of the Commission's own justification. See Continuing Resolution of December 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2186 (1988). Particularly in light of the doubts created by *Wygant* and *Croson* as to whether this alternative theory could shore up the constitutionality of the Commission's policy, I believe the case should be remanded to the Commission for it to interpret Congress's directions.

[1] The FCC's counsel asserts that the Commission has not adopted this latter, so-called "remedial" rationale for its minority preference policy. See FCC Brief at 30 ("The FCC's goal in implementing the preference policy, however, has not been to remedy prior discrimination against minorities or to provide remedial benefits.").

I. The Program Diversity Purpose

The word "diversity" comprises a multitude of goals and methods. The Commission has adopted, and the Supreme Court approved, "cross-ownership" rules intended by the Commission to deconcentrate ownership and thereby to foster diversity of viewpoints. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978). But despite the Commission's using the word "diversity" to label the goal of its racial preferences, the approaches have al- [**873 F.2d 357**] most nothing in common. Deconcentrating ownership bears no resemblance to allocating licenses on the basis of the applicants' race, for the purpose of generating programs "targeted" at specific ethnic groups.

The FCC notes in its brief that "the purpose of the [minority preference] policy has been clearly explained by the Commission and Congress as being to enhance program diversity by increasing ownership of stations by significant groups that are substantially underrepresented in station ownership." FCC Brief at 47 n. 47. If the Commission's purpose were ethnically proportional representation of programmers for its own sake, its action would be clearly unconstitutional in the absence of a remedial

justification. As Justice Powell said in *Bakke*, "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Regents of the University of California v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978); see also *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967) ("this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943)).

At several points the Commission's arguments suggest that the stated program diversity goal has in fact dissolved into a simple quest for racial or ethnic proportionality in license ownership. The Commission has never developed any data suggesting that the listening or viewing tastes of any ethnic group are either distinctive or undersupplied. Indeed, responding to the argument that its present scheme is of unlimited duration (because there is no measureable goal whose attainment would call a halt), its brief simply referred the reader to data on minority underrepresentation in license *ownership*. See FCC Brief at 47 n. 47, referring to *id.* at 30 n. 33. Nonetheless, I take the Commission at its word—or better—and examine the program-diversity rationale on the premise that it is genuine.

Under the view adopted by a majority of the Supreme Court for the first time in *Croson*, race-based decision criteria must withstanding "strict scrutiny" to survive an equal protection attack. See *Croson*, ___ U.S. at ___, 109 S.Ct. at 721 (Part III-A)[2]; *id.* at ___, 109 S.Ct. at 735

[2] Justice O'Connor wrote a six-part opinion in *Croson*. A majority of the Court agreed to three of those parts—I, III-B and IV. All citations to these majority statements will be in the usual form, without parenthetical reference to authorship. Part II of Justice O'Connor's opinion

(Scalia, J., concurring); see also *id.* at ___, 109 S.Ct. at 752 (Marshall, J., dissenting) (noting it as *novel* aspect of majority decision). More specifically, the government's goal must be a "compelling" one and the means selected must be "narrowly tailored" to fulfillment of that goal.

In asserting the compelling character of the goal of program diversity, the Commission seeks to ride on Justice Powell's endorsement of a "diversity" rationale in the context of educational admissions policy. See *Bakke*, 438 U.S. at 311-12, 98 S.Ct. at 2759-60. But the diversity purportedly sought by the Commission is altogether different from what Justice Powell would have sanctioned. Ethnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device *against* ethnic stereotyping. In his dissent in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), Justice Stevens made just this point—that the "inclusion of minority teachers in the educational process inevitably tends to *dispel* [the] illusion" that skin color is a proper basis for inferring character or conduct. *Id.* at 316, 106 S.Ct. at 1869 (emphasis added).

Observers of programming from a minority-owned station, of course, cannot see [**873 F.2d 358**] the owners and thereby learn the irrelevance of race to conduct. Indeed, the Commission believes that viewers who could do so would learn what it apparently believes already—that skin color is a sound basis for predicting behavior. For the Commission's theory to make sense, in fact, skin color or ethnicity must be an excellent clue not only to what owners want to provide but also to what viewers and listeners

was joined by Justices Rehnquist and White. Parts III-A and V were joined by Justices Rehnquist, White and Kennedy. All citations to these plurality portions of the opinion will include the relevant part number, but will not specify authorship.

want to receive. Its race preference plan is based at the core on precisely the racial stereotyping that the *Croson* majority identified as the central evil in the use of race-based decision criteria. See ___ U.S. at ___, 109 S.Ct. at 721 (Part III-A); *id.* at ___-___, 109 S.Ct. at 730-34 (Stevens, J., concurring); *id.* at ___, ___, 109 S.Ct. at 735, 739 (Scalia, J., concurring).

Sustaining the program diversity theory would require the court to have some basis for believing that minority ownership would *lead to* "minority programming" in some sense that is both intelligible and permissible, and, second, that broadcast offerings are not currently "diverse." There is no basis in the record for either. No party here has offered a definition of minority programming that is empirically verifiable and can serve as a goal that government may constitutionally pursue. Thus it is not surprising that the data do not support any claim that the Commission's racial decision criteria are even reasonably (much less "narrowly") tailored to fulfill any constitutional goal. Moreover, the only data to which our attention has been called, taken at face value and assuming arguendo that they are meaningful in terms other than pure racial stereotyping, suggest that the goal posited by the Commission has been achieved quite independently of its racial decision criteria.

As Judge Silberman has shown in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600, ___ F.2d ___ (D.C. Cir. March 31, 1989), Congress made no findings which support the theory of a nexus between race and diverse programming when it adopted a lottery system for allocating broadcast licenses. See *Shurberg*, Silberman op. at ___-___ ("Nowhere in the House report [H.R.Rep. No. 765, 97th Cong., 2d Sess. (1982) U.S.Code Cong. & Admin.News 1982 p. 2237][3] is there evidence presented of a

[3] The report explains the House-Senate conference's approval of § 115

nexus between program diversity and minority ownership, nor is there reference to evidence upon which the committee drew."). Nor was this evidentiary void filled by the Continuing Resolution in 1987. See Pub.L. No. 100-202, 101 Stat. at 1329-31; *Shurberg*, Silberman op. at ___ (S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987), added only an assertion that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences.").

Several parties in this case urge that a Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), proves a link between minority ownership and diverse programming. See FCC Brief at 46-47; Rainbow Brief at 24. Examination of the CRS Report is valuable not so much for what it proves—which as I will try to show is very little—as for what it suggests about the inevitable collapse of *any* evidence purporting to link racial criteria for station allocation with a goal of program diversity.

In preparing the study, the Service examined data from nearly 9000 responses to an FCC survey of about 11,000 American radio and television stations. See CRS Report at 2. The survey first asked station owners what percentage of the ownership interest in their station was held by women or members of specific minority groups.[4] It then sought data on programming conduct. Both radio and TV station owners were asked whether their programming was directed to or provided special services for any of nine listed groups, including specific minorities, women, children [**873 F.2d 359**] and senior citizens. Respondents were

of the Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)).

[4] The minority groups were Black (not of Hispanic origin), Hispanic, American Indian or Alaskan Native, and Asian or Pacific Islander.

asked to state whether the targeting or format was for 1-19 hours per week or for more than 20 hours per week.

The CRS found some correlation between minority ownership and "audience-targeted" programming. Whereas only 20 percent of stations without any black ownership responded that they engage in "black programming," 65 percent of stations with black ownership said that they did so. *Id.* at 13. For Hispanic ownership and "Hispanic programming," the corresponding figures are 10 percent and 59 percent. *Id.* at 13, 15. Without employing any of the conventional paraphernalia of modern statistics, the CRS hesitantly inferred a causal connection:

> [T]here is a strong indication that minority and women station ownership results in a greater degree of minority programming [than does nonminority ownership]. Therefore, an argument can be made that FCC policies that enhanced minority and women station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity.

Id. at cover page.

First I will note a rather plain methodological flaw in the survey and then turn to its basic conceptual defect. The designers of the survey made no effort to adjust for possible differences in the racial composition of the various station owners' potential audiences. This makes it impossible to examine the role of market demand as a force behind programming decisions. "Hispanic-targeting"[5] is ob-

[5] I assume for the sake of argument that "Hispanic targeting" has an intelligible meaning. If it is a fancy phrase for Spanish-language programming, then indeed it would.

viously more likely to be profitable in Miami than in Minneapolis. Thus, if specific minorities are more likely to own stations in areas where they are numerous (as seems likely), the difference in "targeting" that the Report hesitantly attributes to the owners' racial characteristics may be due simply to their rational responses to demand. The Report itself acknowledged that it "would be difficult to determine to what degree station programming strategies are market driven rather than the results of minority ownership interest." CRS Report at 3.

Far more critical than this methodological flaw, however, is the survey's failure to define "minority-targeted programming." As the survey omitted that vital step, it and the Report prove only that black owners are more likely to *say* that they target black audiences, Hispanic owners that they target Hispanic audiences, and so on.

One can easily understand why the Commission refrained from defining black-targeted or other "minority-targeted" programming. The entire exercise would almost necessarily have constituted the crudest type of racial stereotyping. I say "almost" advisedly. It is conceivable that survey data might support the notion that blacks (say) had a greater taste for some specific programming feature. *If* that were true as an empirical matter, it would not be racist to say so. But if it were, and if it is permissible for the Commission to pursue program diversity by means other than general dispersion of ownership, it would simply expose the availability of a non-race-specific solution for the Commission: it could ascertain whether that sort of programming was underrepresented in relation to demand and take such steps as might be constitutionally available to stimulate its supply. If the answer is that there are no constitutionally permissible steps that it might take, then it is hard to see why the Commission has *greater* authority to stimulate the supply by its present means—which are not only roundabout but race-based.

The Commission avoided obvious racial stereotyping in its survey design by the blunt device of refusing to define the various types of "minority" programming at issue. The omission renders its data meaningless. It also tends to undermine any [873 F.2d 360] claim by the Commission that its goal was "compelling": no one can seriously argue that there is a compelling governmental interest in increasing the proportion of station owners who *say* they engage in something they *call* minority programming.

The Commission's goal also appears indeterminate, so that neither the Commission nor any observer will ever be able to discern that it has been attained. But all members of the Court appear to agree that a racial preference cannot be considered a "narrowly tailored" means if it can never reach its stated end. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1067, 94 L.Ed.2d 203 (1987) (Brennan, J., for himself and Justices Marshall, Blackmun and Powell) (among factors determining whether race-conscious remedies are appropriate are "the flexibility and duration of the relief"). In *Croson* four members of the Court severely criticized theories that "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." ___ U.S. at ___, 109 S.Ct. at 723 (Part III-A). They rejected outright remedies "that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* (quoting *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848 (plurality op.)). Although the other two concurring Justices did not join that portion of the Court's opinion, their opinions show no greater tolerance of racial preferences that have no clearly specified goal whose attainment will bring the preference to an end. See ___ U.S. at ___, 109 S.Ct. at 730 (Stevens, J., concurring) ("When [government] creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification

is imperative.") (quoting *Fullilove*, 448 U.S. at 552-54, 100 S.Ct. at 2813-14); ___ U.S. at ___, 109 S.Ct. at 738 (Scalia, J., concurring) ("[T]he remedial power extends no further than the scope of the continuing constitutional violation. . . . And it is implicit in our cases that after the [violative] school system has been completely disestablished, the States may no longer assign students by race.").

The stated goal here—some sort of optimal or proportional relation of programming to ethnic taste—is undefined and seemingly not definable except in racial terms. Plainly there can be no assurance of an end to the racial preference if there is no way—except the Commission's conclusory say-so—of ascertaining when the goal is reached.

The Commission gives some clue as to how in fact it would measure the attainment of its goals. Its response in this very case to the argument that the minority preference was "open-ended as to duration" was to point to the figures comparing the percent of minorities in the population with the percent of stations owned and controlled by minorities. See FCC Brief at 47 n. 47, referring to *id.* at 30 n. 33. Thus the Commission apparently intends to stop only when proportionality in ownership is attained. Whatever the Commission may think it is doing, its stated criteria indicate that its supposedly nonremedial program-diversity goal is only a stalking horse for making license ownership replicate the racial proportions of the population at large.

The Commission might escape the challenge of defining its programming goal by positing the existence of some ineffable attribute of programming by minorities, arising out of such elements as may be common to the experience of the specific minority group. To the extent that such an attribute exists, one could say that, *by definition*, programming by minority-owned stations will reflect the ineffable characteristic. There would be no empirical problem.

This response would prove too much. If government may simply assume some inherently non-measurable race-conduct link and pursue diversity of conduct by allocating government benefits on a basis of racial proportions, then obviously there is no constitutional obstacle to race-based decision criteria. The Commission would be free to orchestrate an ethnically defined array of radio and TV programs, each designed to match "black tastes," "white [873 F.2d 367] tastes," "Hispanic tastes" or "Asian-American tastes"—or, indeed, as its ethnic analysts advanced in sophistication, "Jewish tastes," "WASP tastes" or "Italian tastes." Neither *Croson* nor any of the Court's decisions in the field can stand for this.

Thus the CRS study not only fails to supply the Commission's factual premises but suggests that it is asking questions that are unanswerable without racial stereotyping.

For a reader willing to ignore these flaws, however, the Report leads to the conclusion that the Commission has already achieved its purported goal. For purposes of testing the relation between "minority-targeted" programming and minority populations, the Commission considered data from ten cities grouped into two categories, one with five large Standard Metropolitan Statistical Areas ("SMSA") and the other with five smaller cities. See *id.* at 349 & n. 1. The study's data show that *non*minority-owned programmers produce minority-targeted formats in percentages *higher* than the percentages of the various minorities in the general population for every minority group in both types of cities. For the five large cities the data are as follows:

	Percent of Population	Percent of Nonminority[4] Stations Broadcasting to Target Minority
Black	17.6	22
Hispanic	14.9	20
Asian/Pac	3.3	5
Ind/Alask	1.7	3

CRS Report at 25, 61-64.

Similarly, in the five smaller cities, nonminority broadcasters also appear to "target" minority audiences in greater percentages than would be called for by their raw proportions of the population:

	Percent of Population	Percent of Nonminority Stations Broadcasting to Target Minority
Black	9.8	24.2
Hispanic	3.4	26.4
Asian/Pac	.44	27.2
Ind/Alask	1.4	26.4

Id. at 26, 73-76. If black-targeted programming as the term is used by the survey respondents has any meaning that is related to some permissible goal, the Commission should declare victory.

This court's 1984 decision in *West Michigan*, sustaining the Commission's racial diversity rationale, cannot survive *Croson*. There a majority of the Supreme Court for the first time insisted on "strict scrutiny" of racial preferences. See above at 349-350. Moreover, that opinion gave unprecedented weight to precisely the criteria under which the Commission's rationale is vulnerable and that *West Michigan* disregarded. First, while *West Michigan* makes

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[4] "Nonminority" as used here and in the following table means not belonging to the specific minority "targeted."

no mention of the hazards of racial stereotyping, the prevailing opinions in *Croson* all express the justices' concern that in the absence of strict judicial review, the political branches' use of racial criteria may reflect and reinforce racial stigmatization. See above at 350. While *West Michigan* casually asserted that the "FCC comparative evaluation process generally conforms to Justice Powell's model," 735 F.2d at 615, the *Croson* Court's evident concern over stereotyping requires us to probe seriously the FCC's assumptions about race as a predictor of conduct—an empirical matter irrelevant to Justice Powell's diversity theory.

Second, the justices' statements of concern that racial preferences may drag on interminably, see above at 352, have no parallel in *West Michigan*—an omission that is hardly surprising as those statements appear to have no roots in prevailing opinions issued before *West Michigan*. (Justice Stevens's statement is taken from his *dissent* in *Fullilove*.) Indeed, *West Michigan* never so much as mentioned the requirement of "narrow tailoring."

I therefore believe that *Croson* fatally undermines *West Michigan*'s conclusory validation of the Commission's racial diversity rationale.

II. The Remedial Purpose

If the Commission's racial preference cannot withstand the equal protection challenge on the basis of its program diversity [873 F.2d 362] purpose, the next question is whether the *intervenor*'s remedial theory fills the gap. One difficulty, obviously, is the theory's possible constitutional infirmity. But the court need reach that issue only if the preference is otherwise a proper exercise of the Commission's authority. It can be such an exercise only if (a) the Commission has properly adopted a remedial program in the discharge of its general authority to advance the public interest in the allocation of licenses *or* (b) if Congress has

mandated such a remedial program. The first possible basis is clearly absent here; the Commission has never sought to explain its racial preference as an attempt to remedy discrimination. The second basis is highly doubtful; Congress's instructions in the Continuing Resolution of December 22, 1987, Pub.L. No. 100-202, 101 Stat. 1329, 1329-31 (1987), and the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2186, 2216-17 (1988), are at best ambiguous. The legislative histories do not support a broad reading of the language used by Congress, and in light of what are at least serious doubts about the constitutionality of any such remedial program on the present record, I believe the appropriations acts do not clearly mandate more than continuation of the Commission's preexisting program of racial preferences for purposes of program diversity.

A. *The Commission's Stated Purpose*

At no time has the Commission sought to explain or justify the racial preference now before us as a remedy for racial discrimination. Under well-established principles of administrative law, we cannot uphold a Commission action on the basis of reasoning that the Commission has not adopted. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

The background of the Commission's policy is no secret. In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir.1973), this court overturned a Commission decision that had refused to award a license applicant credit for minority ownership. Noting that the Commission had rested its efforts to diffuse ownership on the belief that such diffusion would bring about diverse program content, the court declared

that the goal of maximum diversification of ownership entailed "favorable consideration to an applicant who ... gives a local minority group media entrepreneurship." *Id.* at 937. The court appeared to make the credit contingent upon a showing that the minority ownership would be likely to enhance diversity of content:

> We hold only that *when* minority ownership *is likely to increase* diversity of content, especially of opinion and viewpoint, merit should be awarded.

Id. at 938 (emphasis added) (citations omitted).

In *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir.1975), the court reviewed another Commission decision declining to award credit for minority ownership, where the applicant had offered no evidence either of dissatisfaction among minorities with existing programs or of any plan to cure it. Despite having appeared in *TV 9* to make credi turn on specific circumstances indicating a likelihood of program diversity, the court now stated that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry." *Id.* at 1063.

The Commission responded to these developments. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). In the Minority Ownership Report of its Minority Ownership Task Force, it stated:

> Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country. **[873 F.2d 363]**
>
> Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.

Federal Communications Commission, Minority Ownership Taskforce Report, Minority Ownership in Broadcasting 1 (May 17, 1978) (emphasis in original).

The references to "underrepresentation" are not linked, of course, to any claim of discrimination. The Commission's rationale remained the one consistently articulated by this court—an extension of the idea that ownership diversity would entail program diversity.

The Commission has, indeed, explicitly abjured any remedial purpose. As it says in its brief here, "[T]he FCC's goal in implementing the preference policy ... has not been to remedy prior discrimination against minorities or to provide remedial benefits." FCC Brief at 30. Further, in its Brief on Rehearing *En Banc* at 18, *Steele v. FCC*, 806 F.2d 1126 (D.C.Cir.1986), it declared the absence of the sort of factual underpinnings best suited to support any such remedial purpose: "There has never been a finding, nor so far as we know even an allegation, that the FCC engaged in prior discrimination against racial minorities or women in its licensing process." Because of its lack of any remedial purpose, it has, of course, never sought to analyse whether past discrimination affords any basis for such a program.

If we assess the Commission's racial preference as an exercise of its mandate to pursue the public interest, and if I am correct in finding that *Croson* and *Wygant* have toppled *West Michigan*'s constitutional validation of the program diversity theory, then the Commission's lack of any effort to support racial preferences as a remedy for discrimination would normally require a remand to the Commission for such further consideration as it found ap-

propriate. Such a remand would be inappropriate, however, if Congress had mandated a remedial program. I therefore turn to the relevant appropriations acts for 1988 and 1989.

B. *The Appropriations Acts*

In appropriating funds for fiscal year 1988, Congress provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended 52 R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev.Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the injury [sic] . . . .

Pub.L. No. 100-202, 101 Stat. 1329-31 (1987). Congress renewed this spending prohibition in the relevant appropriations measure for fiscal year 1989. See Pub.L. No. 100-459, 102 Stat. 2186, 2216-17 (1988) (same language). Accordingly, the Commission proceeded to resolve the present licensing dispute by reference to the preexisting policy. See *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

If Congress had enacted the racial preference here at issue into law, of course, that preference would be a part of the law governing the Commission's license allocation activities; the Commission would be bound to apply it, and

we to uphold the application in the absence of constitutional [**873 F.2d 364**] defect. But that is not what Congress did. It ordered a kind of mental standstill, prohibiting the use of funds appropriated under the acts to "repeal, to retroactively apply changes in, or to continue a reexamination of, the [specified] policies," "other than to close" the docket in which the Commission was reexamining its various racial and gender preferences "with a reinstatement of prior policy." In this context "policy" is ambiguous. So far as comparative licensing is concerned, the laws do not state whether the permissible policy, i.e., the one which the Commission *may* spend the appropriated funds to reinstate, is the Commission's pre-existing pursuit of program diversity through racial preferences, or outright racial preferences for some other (unspecified) purpose. Thus they do not address what the Commission should do if it applies *its* prior policy (defined in the only terms that the Commission has ever articulated), and the policy as so defined and rationalized is found constitutionally defective.

In at least two respects the context of the appropriations acts militate against reading them as mandating the use of racial preferences even if the Commission's diversity-based ones are unconstitutional. First, it would seem anomalous for Congress to lock the Commission into a policy broader than it had ever before applied without specifically articulating the new policy and its bases. Second, as the restriction is limited in time to the period of the Commission's reliance on the appropriated funds, the Commission would be free to abandon the policy thereafter, a result that seems especially curious for a *new* policy.

The legislative history of the Continuing Resolution does not entirely clarify Congress's intent, but it contains no hint that Congress contemplated an enlarged reading of the FCC's "policy." The restriction was added to H.R. 2763 during Senate committee hearings, with the statement that the FCC's reexamination of the minority pref-

erence policies was "unwarranted." S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). The Report went on to note that "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences." *Id.* The only other specific references to the minority preference policy that I uncovered in the legislative history were brief remarks by Senator Lautenberg during the Senate discussions of H.R. 2763. In supporting the amendment, which he had proposed, Senator Lautenberg echoed the Report's focus on program diversity:

> Important goals of our communications policy should be the promotion of diverse viewpoints, and service to diverse audiences. To meet these goals, it is important that we promote diversity of ownership of broadcast licenses. . . . Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

133 Cong.Rec. S14395 (daily ed. October 15, 1987) (statement of Sen. Lautenberg). Obviously, neither of these expressions refers to any remedial purpose.

Similarly, the legislative history of the 1989 appropriations restriction gives no reason to believe that Congress was imposing a remedial rationale on the agency. The spending prohibition in the relevant act for 1989 was introduced in the Senate committee report, S.Rep. No. 100-388, 100th Cong., 2d Sess. 78-79 (1988). The sole remarks concerning this addition were that "[t]he Committee has also continued language from previous appropriations acts with regard to VHF-UHF swaps and minority and women ownership of broadcasting licenses." *Id.* at 79. Senator Hollings was the only legislator who spoke on the minority ownership provision during either the House or Senate

debates on the bill. He discussed the CRS Report, which had been recently issued, and said:

> The report clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves.
>
> The FCC's rationale for questioning the constitutionality of the minority/female ownership policies is factually and [**873 F.2d 365**] legally invalid. I am a strong supporter of diversity in ownership and programming. . . . *The language in this year's appropriations bill simply preserves long-standing policies of both the Congress and the FCC.* . . .

134 Cong.Rec. S10021 (daily ed. July 27, 1988) (statement of Sen. Hollings) (emphasis added). Thus the legislative history of the 1989 appropriation, like that for 1988, appears to evidence only a congressional wish to continue the policy of trying to enhance program diversity.

Serious doubts about the constitutionality of a remedial rationale for the Commission's racial preference rule also call for a narrow reading of the appropriations acts. *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).[7] It is true that in *West Michigan* this court relied on a remedial purpose to support its finding of the preference's constitutionality. See 735 F.2d at 614-16. But as the *FCC*'s purpose was exclusively to promote programming diversity, only that purpose was properly under

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[7] The principle that statutes should be read so as to avoid constitutional questions where fairly possible appears to extend to situations like this one, in which the event casting doubt on a statute's constitutionality (here, the decision in *Croson*) occurs *after* Congress enacted the law. See, for example, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367-75, 91 S.Ct. 1400, 1403-08, 28 L.Ed.2d 822 (1971) (federal statute written in 1930 interpreted to incorporate 14-day time limit on commencement of forfeiture proceedings, and 60-day limit on their completion, both inferred from 1965 decision of Supreme Court).

review. The portion of *West Michigan* addressing remedial concerns is therefore dictum.

Even were *West Michigan* a holding on the remedial purpose, its reasoning appears largely undermined by *Wygant* and *Croson*. First, it accepted findings of past discrimination that are likely insufficient under present standards. Second, it completely neglected the question whether the "remedy" was "narrowly tailored," an issue now likely to be critical.

Discrimination. The *West Michigan* court noted that the allocation there under review "came on the heels" of Congress's passage of § 115 of the Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)), authorizing Commission use of lotteries for license allocation but subjecting such lotteries to special minority preference requirements. 735 F.2d at 613, 615-16. The court noted that Congress had based the preference requirements on findings of "underrepresentation" of minorities in the broadcast media and had characterized this underrepresentation as flowing from " 'the effects of past inequities stemming from racial and ethnic discrimination.' " *Id.* at 614 (quoting H.R. Conf.Rep. No. 97-765; 97th Cong., 2d Sess. 43 (1982), U.S.Code Cong. & Admin.News 1982, p. 2287). The court read the enactment of the lottery provisions under these circumstances "as giving congressional confirmation to the factual bases of [the] remedial nature [of the FCC's various minority preference policies]." 735 F.2d at 616.

I agree with Judge Silberman's conclusion in *Shurberg* that these "findings" are inadequately supported to show prior discrimination by the FCC or the broadcast industry. See *Shurberg*, Silberman op. at ___ ("Neither Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry.") (citation omitted); see generally *id.* at ___ -

___. In the absence of findings of any discrimination by the agency or in the industry, the congressional statements can sustain the preference only if general societal discrimination suffices to support a race-based remedial program.

Three Supreme Court decisions are relevant to an assessment of such general discrimination: *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), *Wygant*, and *Croson*. In *Fullilove* the Court upheld a 10% minority set-aside program established by Congress for federal grants to state and local governments for use in public works projects. Both Chief Justice Burger's plurality opinion and Justice Powell's concurrence stressed Con- [873 F.2d 366] gress's unique role in ensuring equal protection under the Fourteenth Amendment. See 448 U.S. at 472-78, 100 S.Ct. at 2771-75, *id.* at 503-06, 100 S.Ct. at 2787-89 (Powell, J., concurring). Both opinions, however, left obscure the extent to which Congress's special role left it free to mandate racial preferences solely on the basis of general societal discrimination. Justice Powell read the record as showing that Congress had made a particularized finding of discrimination by the governmental unit involved: "Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503, 100 S.Ct. at 2787 (citation omitted). The plurality was less clear on whether the identified discrimination was specifically in the contracting business, or merely in society at large. The opinion declared that Congress "had before it . . . evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . . ." *Id.* at 478, 100 S.Ct. at 2774.

In *Wygant*, where the Court invalidated a purely local racial preference, the plurality's holding and rationale appeared to reject generalized findings of discrimination as a basis for race-based remedial measures. In his plurality opinion, Justice Powell observed that the Court had never held that societal discrimination alone sufficed to justify a racial classification. "Rather, the Court has insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847 (emphasis added). While the Court held that there need not be "findings" of prior unlawful discrimination, it did require that a "firm basis" exist for believing that the public entity had engaged in discrimination. *Id.* at 293, 106 S.Ct. at 1856 (O'Connor, J., concurring). Justice O'Connor suggested as an example of such a "basis" the evidence needed to support a prima facie Title VII pattern or practice claim. *Id.* at 292, 106 S.Ct. at 1856.

Wygant, of course, does not directly consider societal discrimination as a legitimate factual predicate for race-based policies adopted by Congress. And the ambiguity of *Fullilove* carries forward to *Croson*. Although the majority nowhere states that Congress has the right to base racially-conscious programs solely on evidence of societal discrimination, neither does it explicitly reject this proposition. See ___ U.S. at ___, 109 S.Ct. at 719 (Part II) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate.").

The Court's recent disposition of *H.K. Porter Co. v. Metropolitan Dade County* indicates that at least some aspects of *Croson* will apply to congressionally authorized racial preferences. The court of appeals had upheld a local racial preference program adopted under the authority of the Surface Transportation Assistance Act of 1978, Pub.L.

No. 95-599, 92 Stat. 2689 (1978), and the Supreme Court remanded "for further consideration in light of" *Croson*. ___ U.S. ___, 109 S.Ct. 1333, ___ L.Ed.2d ___ (1989), vacating 825 F.2d 324 (11th Cir.1987); see also *Croson*, ___ U.S. at ___, 109 S.Ct. at 740 (Marshall, J., dissenting) (commenting that the *Croson* majority opinion represented a "deliberate and giant step" away from *Fullilove*).

The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences. But I pause to note how little there is here. There is no finding by a court or anyone of discrimination in the allocation of broadcasting channels. Nor has any evidence been presented to this court that would amount to prima facie evidence of a discriminatory pattern or practice. See *Wygant*, 476 U.S. at 292-94, 106 S.Ct. at 1856- **[873 F.2d 367]** 57 (O'Connor, J., concurring) (suggesting that such evidence would suffice). Apart from the conclusory references by congressional committees discussed above, there is simply the Commission's observation that only 2.1 percent of radio and TV stations are minority owned and controlled, as against a 23.5 percent minority share of the general population. FCC Brief at 30 n. 33.

Discrepancies between the ethnic proportions among persons receiving a government benefit and among the population at large cannot be evidence of discrimination where special qualifications are needed for receipt of the benefit. See, e.g., *Croson*, ___ U.S. at ___, 109 S.Ct. at 725 ("[w]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.") (citations omitted). Justice O'Connor went on to point out that there was no evidence of the number of minority business enterprises in the relevant market, and indeed noted evidence that black-owned businesses were not homogeneously distributed among industries. *Id.* As the FCC's "integra-

tion" requirements compel the synthesis of ownership and day-to-day management in the same hands, the relevant pool consists of potential owner-managers of radio and TV stations. The figures discussed by the FCC—including those in the CRS Report—nowhere reveal the number or proportion of minorities in this group. In the case at hand, the Rainbow principals are of Hispanic origin, yet we have *no data* on the relative eligibility and participation rates of this group. See *Croson*, ___ U.S. at ___, 109 S.Ct. at 728 (highlighting complete absence of evidence of discrimination against Spanish-speaking and other non-black beneficiaries of Richmond's set-aside program, program's "random inclusion of racial groups that . . . may never have suffered from discrimination in the construction industry," and its "gross overinclusiveness").

Nonetheless, because of the persisting uncertainty over the nature of the discrimination necessary for congressionally mandated remedial preferences, I turn to the issue of whether the preference is "narrowly tailored" or properly "fits" the evil to be cured.

Narrow tailoring. The *Croson* majority took two ameliorating features of the program upheld in *Fullilove* and made their absence critical to the rejection of the Richmond plan. First, in *Fullilove* three justices upholding the preference noted that before adopting the set-asides Congress had considered and attempted alternatives which were not based on racial criteria. See *Fullilove*, 448 U.S. at 463-67, 100 S.Ct. at 2767-69; *id.* at 511, 100 S.Ct. at 2791 (Powell, J., concurring). In *Croson* those justices of the majority whose constitutional views were most tolerant of racial preferences found the Richmond council's failure to consider such alternatives a critical defect. See ___ U.S. at ___, 109 S.Ct. at 728 ("The principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE [Minority Business Enterprise] set-aside."). As the Commission adopted the racial preference on the basis of its

and this court's program diversity theory, and as it is most unclear whether Congress has ever endorsed a remedial theory for the program (the point indeed at issue here), it can hardly be said that the program rests on *anyone*'s findings as to the inadequacy of non-race-based alternatives.

Second, the three justices of the *Fullilove* plurality had noted as "significant" that the congressional program at issue provided for waiver of the 10% minority participation requirement "to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination." *Fullilove*, 448 U.S. at 488, 100 S.Ct. at 728. In *Croson*, the majority opinion emphasized the absence of any such built-in limit. "Unlike the program upheld in *Fullilove*, the . . . system focuses solely on the availability of MBEs; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contrac- [873 F.2d 368] tors." *Croson*, ___ U.S. at ___, 109 S.Ct. at 729. This reading of *Fullilove*—whereby the set-aside seemingly applies only to victims of prior discrimination by the agency or industry involved—further undercuts the Commission's claim that its policy is sufficiently narrow in scope.[8] Indeed, it is hard to see how a program can be "narrowly tailored" as a remedy for societal discrimination if competitors have no opportunity to show that individual

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[8] It also sheds light on the question of whether after *Croson* Congress can find remedying general societal discrimination to be a compelling state interest under the Fourteenth Amendment. If the only permissible (narrowly tailored) remedies are those which extend solely to victims of past discrimination perpetrated by the governmental unit or industry at hand, then the only discrimination that even Congress may remedy is discrimination that can be shown to account for the specific beneficiary's plight.

beneficiaries have suffered no impairment of their license-securing ability attributable to that discrimination.

Moreover, in *Croson* (for the first time) the Court made the point that where an agency is making decisions "on a case-by-case basis," it was hard "to see the need for a rigid numerical quota." ___ U.S. at ___, 109 S.Ct. at 730. For such programs, the Court plainly believed, it was practical to ascertain whether discrimination had in fact impaired the proposed beneficiary's competitive position. Although the FCC's preference is not in form a "rigid numerical quota" (a point explored immediately below), the Court's analysis seems equally applicable. Where the government is proceeding on a case-by-case basis, there is no obvious need to employ a mechanical racial preference and forego inquiry into the beneficiaries' actual circumstances. No FCC preference for successful Hispanic entrepreneurs can remedy the years spent by other Hispanics picking lettuce as a result of racial discrimination. At least it cannot if we think of people as individuals.

In upholding the FCC's racial preference policy, *West Michigan* relied heavily on the FCC's treatment of race as merely one of many "factors." 735 F.2d at 613. I am unpersuaded that the multi-factored approach in this case—if that is what it really is—saves the minority preference scheme. As Judge Silberman explained in his opinion in *Shurberg* at ___, "[T]he constitutional distinction between a tolerable and intolerable burden on the innocent turns on the uniqueness and value of the opportunity lost." Here, as in *Shurberg*, Metro was denied a comparative hearing on the only new license currently being offered in the Orlando area. Thus, Rainbow's victory, in which the minority preference was dispositive, deprived the other competitors of their only chance for a new license for the foreseeable future.

Moreover, on the present facts the line between a simple quota and a multi-factored allocation is painfully thin. The

Commission has made clear that it proposes to keep giving race weight until license ownership matches the racial composition of the population at large. See above at 352. That looks like a quota. The only refinement is that the Commission is working to fulfill it gradually—as it must, given the limited number of stations available to allocate each year. The Commission's candid briefing thus appears to remove a distinction that the *West Michigan* court found critical. See *West Michigan*, 735 F.2d at 613.

Even if one assumes, however, along with *West Michigan*, that there are adequate findings of discrimination, that the FCC's minority preference program is genuinely a multi-factored test rather than pursuit of a quota, and that the burden on nonminority applicants is sufficiently light to pass constitutional scrutiny, I believe that the plan is undermined by the two defects that *Croson* made critical—the absence of consideration of alternative nonracial solutions and the omission of a waiver provision that effectively confines the benefits to individuals who have suffered identifiable discrimination.

It is plain that the FCC has not offered a remedial rationale for its policy. Nor could it possibly be said that the appropriations acts clearly establish a remedial policy, in light of the textual ambiguity concerning the word "policy" in the appropriations [**873 F.2d 369**] acts, their legislative histories, and the strong possibility that even supported as a remedy the FCC's racial preference program would violate the equal protection clause. Whether we could uphold a Commission finding that the acts established such a policy, given the deference it enjoys in matters of law under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984), is not before us, in the absence of any FCC consideration of the point. See *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1172 (D.C.Cir.1986) (deference must be based on agency's exercise of its interpretive judgment).

CONCLUSION

Finding the program diversity theory unconstitutional because plainly based on impermissible racial stereotypes, and finding no adoption of any remedial justification by the Commission or Congress, I would remand to the Commission for further proceedings. The FCC's first task on remand would be to interpret the relevant appropriations act for 1989 to determine whether it mandates a remedial preference policy. If the FCC determines that it does not, it would be free to reassess the preference policy in light of the unconstitutionality of the program diversity rationale.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 85-1755

Winter Park Communications,

Appellant

v.

Federal Communications Commission,

Appellee

Rainbow Broadcasting Company,
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce,
City of Winter Park,

Intervenors

and consolidated case No. 85-1756

[Filed Apr. 21, 1989]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

Constance L. Dupre
Clerk

APPENDIX B

[3 FCC Rcd 866]

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS, INC. Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1988; Released: February 23, 1988

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF television station on Channel 65 at Orlando/Winter Park, Florida. In an order released October 18, 1985, the Commission upheld a Review Board decision granting the application of Rainbow Broadcasting Company (Rainbow) and denying the applications of Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park). *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985.

2. Metro and Winter Park filed appeals from the Commission's decision with the Court of Appeals for the District of Columbia Circuit. *Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir.) and consolidated case. One issue raised on appeal was whether the Commission properly evaluated the applicants under the "integration of ownership and management" criterion, which included an award of a slight gender preference and substantial minority preference to Rainbow, the winning applicant.

3. In a 1985 decision, a divided three-judge panel of the Court of Appeals held that the Commission's policy applying a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated*, October 31, 1985, *remanded*, October 9, 1986. The Court *en banc* vacated the panel opinion and ordered rehearing. Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a preference would be dispositive.

4. In light of the remand in the *Steele* case, the Commission sought a remand of the record in the instant proceeding to determine whether the minority preference it had awarded to Rainbow was of decisional significance.[1]

[1] The Commission already had determined in its October 1985 *Order*

The Court granted the Commission's Motion for Remand and a related motion by Metro on November 5, 1986. On remand, the Commission concluded that deletion of Rainbow's minority and female preferences could reverse the outcome of this proceeding and result in an award to Metro. Accordingly, the Commission ordered this proceeding held in abeyance pending further action pursuant to the Commission's consideration of MM Docket No. 86-484. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987).

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[2] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, *as amended*, 52 R.R. 2d 1313 (1982) [sic][3] and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 Rev. Bd. (1978) [sic],[4] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

that even if no consideration were given to Rainbow's 5% female participation, it would not change the outcome of this proceeding. *Metro Broadcasting, Inc.*, FCC 85-558, 6 20. Therefore, only the minority preference was potentially dispositive.

[2] *Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[3] 52 RR 2d 1301 (1982).

[4] 69 FCC 2d 607 (Rev. Bd. 1978).

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its comparative licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its comparative licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board and the Office of the General Counsel process all comparative licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, that in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its comparative preference policy, the instant proceeding IS REACTIVATED and the Commission's *Order*, FCC 85-558, upholding the Review Board decision granting Rainbow Broadcasting Company's application IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202. [3 **FCC Rcd 867**]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

[2 FCC Rcd 1474]

In re Applications of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS, INC. Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1987; Released: March 9, 1987

By the Commission:

1. Before the Commission are: (1) the above-captioned applications remanded by the United States Court of Appeals for the District of Columbia Circuit. (2) Comments filed November 17, 1986 by Winter Park Communications, Inc. (Winter Park) and November 18 by Metro Broadcasting, Inc. (Metro) and Rainbow Broadcasting Company (Rainbow), and (3) Reply Comments filed December 1 by Winter Park, Metro, and Rainbow.

I. BACKGROUND

2. Metro, Rainbow, and Winter Park are mutually exclusive applicants for a new UHF television station on Channel 65 at Orlando/Winter Park, Florida. On October 18, 1985, the Commission upheld a Review Board Decision granting Rainbow's application and denying the applications of Metro and Winter Park. *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985.

3. The comparative analysis of the applicants, none of which had any other media interests, turned on their respective proposals to integrate ownership into management. Winter Park, which proposed no full time integration was far inferior to the other two applicants. On the other hand, Rainbow received quantitative credit for 90% full time integration, whereas Metro was credited quantitatively with 79.2% full time and 19.8% part time integration. Qualitatively, Rainbow also was given a substantial preference for minority ownership participation (90% vs. 19.8%) and a very slight preference for female ownership participation (5% vs. 0%). Additionally, Rainbow received a solid preference for broadcast experience, because the experience of Rainbow's 85% owner was judged far more extensive than the relatively minor experience of two of Metro's owners, each holding a 19.8% interest. The Board did, however, award Metro a moderate preference based on the local residence and civic activities of 99% of its ownership. In reaching its Decision, the Board stated:

> . . . [W]hile [Rainbow's] 10.8% advantage [in full time integration] is probably a "clear" enough difference to be decisional . . . we conclude that it is also ahead qualitatively . . . [B]ased on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro.[1]

[1] 99 FCC 2d at 703-04. In denying review, the Commission held that

4. After the Commission upheld the Board's Decision, Metro and Winter Park, the two losing applicants, filed appeals. *Winter Park Communications, Inc. v. FCC,* No. 85-1755 (D.C. Cir.) and consolidated case. A panel of the Court of Appeals for the D.C. Circuit held that the Commission lacked statutory authority for its female preference policy. *Steele v. FCC,* 770 F.2d 1192 (D.C. Cir. 1985). Subsequently, on October 3, 1985, the full court vacated that decision and, on October 9, 1986, granted the Commission's motion for remand to permit it to consider questions concerning the constitutional and statutory authority for awarding comparative preferences based on race and gender.[2] Subsequently, the Commission initiated a separate nonadjudicatory proceeding to explore these questions. *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications,* 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484). Therein, the Commission determined that it would defer action on cases in which racial, ethnic, or gender preferences were found to be dispositive pending final resolution of that proceeding.

5. The Commission sought remand of the instant case to determine whether the minority and female preferences awarded Rainbow are of decisional significance. The court granted the Commission's Motion for Remand and a related Motion by Metro on November 5, 1986. The Commission thereupon sought comments from the parties. FCC 861-136, released November 7, 1986.

Rainbow would have an advantage over Metro even if Metro's local residence preference were considered substantial.

[2] When the gender preference was first announced by the Commission's Review Board in 1978, it was explained that the female preference was adopted "upon essentially the same basis as the merit given for black ownership and participation." *Mid-Florida Television Corp.,* 69 FCC 2d 607, 652 (Rev. Bd. 1978); *Steele v. FCC,* 770 F.2d at 1200-12 (Wald, J., dissenting). The Commission's analytical concerns about the constitutional validity of both minority anershid gender preferences were identical. For this reason, as well as the fact that the gender preference policy was an outgrowth of the minority preference policy, the Commission sought a remand that would enable it to address both issues in a comprehensive manner.

II. THE PARTIES' COMMENTS[3]

6. Rainbow argues that even without preferences for minority and female integration it is quantitatively and qualitatively superior to Metro. It points out that *New Continental Broadcasting Co.,* 88 FCC 2d 830, 850 (Rev. Bd. 1981), *remanded on other grounds,* 93 FCC 2d 1275 (1983), held that a 12.5% advantage in full time quantitative integration was "clear" and thus sufficient to outweigh qualitative integration differences.[4] According to Rainbow, its 10.8% advantage should be similarly decisive. As to qualitative differences, Rainbow maintains that its substantial advantage for broadcast experience and the assertedly strong local ties of its owners outweigh Metro's local residence and civic participation credit.

7. Metro contends that there is no significant difference in quantitative integration between it and Rainbow and that, in the absence of Rainbow's minority and female preferences, Metro's local residence advantage is decisive. Metro urges the Commission not to follow *New Continental* and also asserts that its 19.8% part time integration should [**2 FCC Rcd 1475**] be given substantial weight here. Qualitatively, Metro argues that Rainbow's broadcast experience and credit for Rainbow's 5% owner deserve little weight.

[3] Winter Park argues that it should prevail or grounds not relevant to the instant remand.

[4] In that case, an applicant with 65% full time integration prevailed over an applicant with 52.5% full time and 37.5% part time integration (20 hours per week). Contrary to Metro's contention *New Continental* does not rely crucially on *Massillon Broadcasting Co., Inc.,* 36 FCC 809 (1964), a case superseded in pertinent respects by the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965).

III. ANALYSIS

8. We agree with Metro that on the facts of this case Rainbow's minority and female preferences appear to be decisionally significant. Accordingly, we will hold this case in abeyance.

9. We conclude that quantitative integration might not be considered dispositive in this case. In previously upholding the Board's Decision, we had no occasion to rule on the Board's observation that Rainbow's quantitative advantage was "probably" clear. Now, however, that question becomes crucial. We decline to extend *New Continental* to the facts of this case. In this regard, careful consideration must be given to the nature of Metro's part time integration of its 19.8% principal Arthur Grindle. Unlike the usual case of part time integration, Grindle would be integrated for most of the year as Metro's full time general manager, except for the two months when he would be in Tallahassee as a member of the Florida House of Representatives. 99 FCC 2d at 701. Rainbow's quantitative advantage over Metro is narrow in any case, and Grindle's integration, even accepting the Board's characterization as "part time," significantly undermines that advantage. Thus, we are not persuaded at this time that sufficient grounds exist to decide this case on the quantitative aspects of the applicants' integration proposals.

10. Because it now appears that Rainbow has no clear quantitative advantage over Metro, we turn now to qualitative factors. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 495, *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984), *modified*, 58 RR 2d 439 (1985). We find that absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro. Rainbow's advantage for broadcast experience, although substantial, would not equal Metro's advantage for local residence and civic participation, since we have characterized broadcast experience as having minor significance in comparison with

the latter factors. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). In finding that Metro has a moderate substantial preference over Rainbow for local residence/civic participation, we have already taken into account the slight credit due Rainbow because its 5% owner Esperanza Rey-Mehr is a local resident and its 85% owner Joseph Rey has promised future local residence. 97 FCC 2d at 704. No further credit is warranted.

11. In view of the foregoing, we conclude that deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro. We will therefore hold this case in abeyance pending our consideration of MM Docket No. 86-484.

12. ACCORDINGLY, IT IS ORDERED, That this proceeding IS HELD IN ABEYANCE pending further action pursuant to our consideration of MM Docket No. 86-484 and subject to any further instructions from the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1755

Winter Park Communications,

Appellant

v.

Federal Communications Commission,

Appellee

Rainbow Broadcasting Company
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce,
City of Winter Park,

Intervenors

[FILED NOV 5 1986]

Before: Mikva, Ginsburg and Silberman, Circuit Judges

ORDER

Upon consideration of the motions of intervenor Metro Broadcasting, Inc. and respondent for remand, of the opposition thereto, and of the motion of intervenor Rainbow Broadcasting Company to strike, and of the opposition and replies thereto, it is

ORDERED, by the Court, that ruling on intervenor's aforesaid motion to strike is deferred pending the oral argument of the above entitled cases. And, it is

FURTHER ORDERED, by the Court, that the aforesaid motions to remand are granted and the record in the above

entitled cases is hereby remanded to the Federal Communications Commission as set forth in the aforesaid motions. The parties are directed to file status reports at forty-five day intervals beginning December 22, 1986.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

By: /s/ Patricia L. Chatman
Patricia L. Chatman
Deputy Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

METRO BROADCASTING, INC. Orlando, Florida	MM DOCKET NO. 83-140 File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	MM DOCKET NO. 83-142 File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS Winter Park, Florida	MM DOCKET NO. 83-143 File No. BPCT-820909KV

For Construction Permit

ORDER

Adopted: October 11, 1985; Released: October 18, 1985

By the Commission:

1. The Commission has before it: (1) Applications for Review filed January 16, 1985 by Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park);[1] (2) Oppositions to the respective Applications for Review filed February 5 by Rainbow Broadcasting Company (Rainbow),[2] an Opposition to Winter Park's Application for Review filed February 5 by Metro, and Comments on Metro's Application for Review filed February 5 by Winter Park; (3) a Motion for Leave to Exceed

[1] Winter Park filed an Erratum January 18.

[2] Rainbow filed Errata on February 19.

Page Limitation filed January 16 by Metro,[3] Oppositions thereto filed January 23 by Winter Park and January 25 by Rainbow, and a Reply filed January 29 by Metro; (4) Motions to Strike [portions of Rainbow's Oppositions to the Applications for Review] filed February 14 by Metro and February 15 by Winter Park and an Opposition thereto filed February 26 by Rainbow; and (5) a Motion for Leave to File Supplement to Application for Review, and a Supplement to Application for Review, filed August 29 by Metro and an Opposition thereto filed September 10 by Rainbow. These pleadings relate to a Decision of the Review Board granting Rainbow's application for a new UHF television station on Channel 65 at Orlando, Florida and denying the applications of Metro and Winter Park.[4]

2. We agree with the Board's resolution of this case. However, we wish to comment on one matter. The Board found that Rainbow's proposal for integration of ownership into management was superior to Metro's. In the Board's view, Rainbow has a clear edge in quantitative integration and its qualitative advantages for minority participation, female participation, and broadcast experience outweigh Metro's advantages in local residence and civic participation. Metro challenges the Board's award of "moderate" rather than "substantial" credit for its local residence. We believe that on the facts before us, even if Metro's local residence credit were increased in the manner suggested and no consideration were given to Rainbow's 5% female participation,[5] it would not change the outcome of this case.

[3] In addition to a 10 page Application for Review filed in accordance with our Rules, Metro has attached a 23 page Application for Review to its Motion for Leave to Exceed Page Limitation.

[4] *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984).

[5] In this regard, we note that the practice of giving credit for female participation was set aside by *Steele v. FCC*, No. 84-1176 (D.C. Cir. August 23, 1985).

3. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Exceed Page Limitation filed January 16, 1985 by Metro Broadcasting, Inc., IS DENIED and the attached 23 page Application for Review IS DISMISSED.[6]

4. IT IS FURTHER ORDERED, That the Motions to Strike filed February 14, 1985 by Metro Broadcasting, Inc. and February 15, 1985 by Winter Park Communications, Inc. ARE GRANTED and those portions of the Oppositions to Applications for Review filed by Rainbow Broadcasting Company which raise new arguments ARE STRICKEN.[7]

5. IT IS FURTHER ORDERED, That the Motion for Leave to File Supplement to Application for Review and Supplement to Application for Review filed August 29, 1985 by Metro Broadcasting, Inc. ARE DISMISSED as moot in light of paragraph 2 *supra*.

6. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Rule the Applications for Review filed January 16, 1985 by Metro Broadcasting, Inc. and Winter Park Communications, Inc. ARE DENIED.[8]

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[6] Metro has not shown that this case is one of unusual complexity.

[7] It is inappropriate to raise new issues in an opposition to an application for review. Such practice tends to undermine the specified pleading schedule and deprive the other parties of a opportunity to respond. *Cf. Newhouse Broadcasting Corp.*, 61 FCC 2d 528, 529 (1976), *recon. granted in part*, 73 FCC 2d 186 (1979). If Rainbow wished to challenge the Board's Decision in any respect, it should have filed an Application for Review or Contingent Application for Review.

[8] One additional matter requires mention although it does not affect the outcome of the case in light of Rainbow's other advantages. The Review Board awarded Metro and Rainbow preferences for proposing auxiliary power. Such preferences are not authorized in television proceedings. *See Minority Broadcasters of East St. Louis Inc.*, 57 RR 2d 1390 (1985), *appeal docketed sub nom. Spectrum Telecommunications Corp. v. FCC*, No. 85-1249 (D.C. Cir. April 15, 1985).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554[99 FCC 2d 688]

In re Applications of

Metro Broadcasting, Inc. Orlando, Florida	MM Docket No. 83-140 File No. BPCT-820707KE
Rainbow Broadcasting Company Orlando, Florida	MM Docket No. 83-142 File No. BPCT-820909KF
Winter Park Communications Winter Park, Florida	MM Docket No. 83-143 File No. BPCT-820909KV

For Construction Permit

Appearances

John H. Midlen, Jr., on behalf of Metro Broadcasting, Inc.; *Barry D. Wood, Richard E. Wiley, John C. Quale, Antoinette D. Cook*, and *Jerry V. Haines*, on behalf of Rainbow Broadcasting Company, and *Robert J. Buenzle*, on behalf of Winter Park Communications.

[99 FCC 2d 689]
DECISION

Adopted: November 23, 1984 Released: December 3, 1984.
BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING DUBITANTE AND ISSUING A SEPARATE STATEMENT.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Metro Broadcasting, Inc. (Metro), Rainbow Broadcasting Company (Rainbow), and Winter Park Communications (Winter Park) for authority to construct a new television broadcast station to operate on Channel 65. Metro and Rainbow propose Orlando, Florida as their community of license; Winter Park proposes the adjacent community of Winter Park. By Hearing Designation Order, 48 Fed. Reg. 10917, published March 15, 1983, these applications were designated for consolidated hearing to determine which proposal would best provide a fair, efficient, and equitable distribution of broadcast service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), and on a contingent comparative issue.[1] By *Memorandum Opinion and Order*, FCC 83M-2102, released June 27, 1983, presiding Administra-

[1] In addition, the application of Harry D. Calhoun et al. d/b/a Orlando Family Television, Ltd. (File No. BPCT-820907KK) was designated for hearing. Subsequently, this application was dismissed by the ALJ, I.D., note 1. By *Memorandum Opinion and Order*, FCC 84R-5, 55 RR 2d 290 (Rev. Bd. 1984), released after the Initial Decision, we granted Orlando Family Television's appeal from its dismissal but remanded the proceeding to the ALJ to determine whether its application conformed with the multiple ownership rules. However, the ALJ subsequently dismissed with prejudice Orlando Family Television's application at its own request and reinstated the Initial Decision. *Memorandum Opinion and Order*, FCC 84M-2345, released May 17, 1984.

tive Law Judge Walter C. Miller (ALJ) added a misrepresentation/lack of candor issue against Rainbow.

2. The Initial Decision (I.D.), FCC 83D-69,90 FCC 2d 1073, released 12-21-83, disqualified Rainbow for misrepresenting decisionally significant facts in the ownership integration proposal it submitted on April 1, 1983, found no Section 307(b) preference to be warranted under the facts of this case, and granted Metro's application after concluding that it was an "overwhelming comparative winner" over Winter Park because of its "clear and decisive" integration preference and its "substantial" comparative engineering coverage preference.

3. The proceeding is now before the Review Board on exceptions filed by all of the applicants. The Board has reviewed the I.D. in light of the [**99 FCC 2d 690**] exceptions and reply briefs, the oral argument held September 26, 1984, and our examination of the record. We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. Because we disagree with the I.D.'s disqualification of Rainbow and find Rainbow to be comparatively the best applicant, we reverse the I.D. and grant Rainbow's application.

4. *Misrepresentation.* The ALJ disqualified Rainbow for misrepresentation based on his finding that it failed to indicate in its April 1, 1982 integration showing submitted to the ALJ that the participation of Leticia Jaramillo (a 10% partner) as proposed full-time program manager was secondary to her inconsistent proposal made in another proceeding to serve as full-time general manager of a station at Sacramento, California. I.D., Findings, paras. 5-18; Conclusions, paras. 2-7. In its exceptions, Rainbow urges the Board to overturn its disqualification because its April 1, 1983 integration proposal was accurate when made and at the time of the hearing, and remains unchanged today. Only during a brief period after the proposal was submitted to the ALJ on April 1, and before the commencement of the hearing on August 22, according to Rainbow, did it consider Jaramillo's Orlando integration proposal to be contingent upon her Sacramento proposal. Also, Rainbow points out that on April 28, the date it filed its integration proposal in the Sacramento proceeding, it filed a petition for leave to amend in the instant case which revealed its contingent Sacramento integration plans. Metro and Winter Park reply that Rainbow's disclosure of its intentions concerning the Sacramento proposal was belated and incomplete and that Rainbow lacked candor when it omitted from its April 1 submission in this proceeding any reference to its inconsistent intentions to be integrated at the Sacramento station.

5. A chronological review of the key facts is enlightening. In its application as originally filed on September 9, 1982, Rainbow disclosed that its principals Joseph Rey (85% owner) and Leticia Jaramillo (10%) also were 10% and 90% owners, respectively, of El Dorado Television Company (El Dorado), which on August 24, 1982 had filed a television broadcast application for a new station at Sacramento, California. Rainbow FCC Form 301, Exh 1 (official notice taken). On November 5, 1982, Rainbow amended its Orlando application to state that its principals "plan to be actively involved in the management of the [Orlando] station on a day-to-day basis." The Sacramento and Orlando proceedings were designated for hearing on February 22 and March 15, 1983, respectively. By *Order Prior to Prehearing Conference*, FCC 83M-940, released March 22, 1983, the ALJ directed each party to the Orlando proceeding to submit within 10 days a written integration proposal. Rainbow's response on April 1, 1983 indicated that each of its principals would be integrated fulltime (40 hours per [**99 FCC 2d 691**] week) into station management roles: Rey as general manager, Jaramillo as program manager, and Esperanza Rey-Mehr (5% owner) as director of Hispanic affairs. Winter Park Special Issue Exh. 3.

6. However, on April 28, 1983, El Dorado responded to a similar order of the presiding officer in the Sacramento proceeding by filing an integration statement that referenced the Orlando integration proposal and committed Rey and Jaramillo to be full-time integrated principals at Sacramento if Rainbow's application were unsuccessful. I.D., Findings, para. 16; Winter Park Special Issue Exh. 1. It further stated that, although Rey's Orlando integration commitment was to "take precedence" over his Sacramento proposal, Jaramillo's commitment to Orlando was secondary to her promise to serve as full-time general manager of the proposed Sacramento station. *Id.* In this latter respect, El Dorado stated:

> [S]hould the Orlando application be granted prior to, or within three years following the initiation of the operation of the Sacramento station. Ms. Jaramillo will transfer her interest in Rainbow Broadcasting Company to Joseph Rey, and will have no mangement role at the Orlando facility.

Id. (In addition, Rey would divest his interest in El Dorado upon grant of a construction permit for the proposed Orlando station. *Id.*) Also on April 28, Rainbow filed a petition for leave to amend which, in addition to reflecting a change of address for Ms. Jaramillo, clarified its Orlando integration proposal:

> The Rainbow application reflects that its partners, Leticia Jaramillo and Joseph Rey, are also partners in El Dorado Television Company, which is one of ten applicants for a construction permit on Channel 29 in Sacramento, California. El Dorado is now engaged in settlement negotiations in which it has offered to dismiss its application in exchange for reimbursement of its prosecutorial expenses. However, if those negotiations fail and the El Dorado application is eventually granted, Ms. Jaramillo will serve as the fulltime general manager of the Sacramento station, and will

> transfer her interest in Rainbow Broadcasting Company to Joseph Rey. In that event, she will terminate her integration commitment with respect to the Orlando station. Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station. In the unlikely event that both applications are granted, Mr. Rey will divest his interest in El Dorado Television Company. El Dorado's Statement for the Record on these matters is being exchanged today in the Sacramento proceeding.

Winter Park Special Exh. 2; Tr. 691-694. The ALJ granted the petition only insofar as it reported the address change, but denied Rainbow's attempt to clarify its integration proposal. *Order*, FCC 83M-1648, released May 18, 1983. Subsequently, he granted a motion to enlarge issues filed May 16, 1983 by Winter Park and added an issue to determine whether Rainbow's April 1, 1983 integration proposal contained misrepresentations or was lacking in candor. FCC 83M-2102, *supra*.

7. At hearing, Rainbow principals Rey and Jaramillo were examined extensively with respect to both the omission from the April 1, 1983 [**99 FCC 2d 692**] integration statement of any reference to their plans to personally manage the Sacramento station and their failure to disclose that, if the Rainbow application were granted within three years after initiation of operation of the Sacramento station, Ms. Jaramillo then would transfer her Rainbow ownership interest to Rey and would abandon the proposed Orlando station. See Tr. 650-888. They explained that in applying for the Sacramento and Orlando construction permits they were seeking ultimately to obtain one station at which they both could work together. Tr. 695-97, 760-61, 853, 877-78. A few days after filing the Sacramento ap-

plication on August 24, 1982, they realized that a total of twelve applicants were vying for that one station and, consequently, their chances in a comparative hearing were slim. Tr. 696, 704, 761-62, 852-53. The Orlando application was then filed on September 9. In February 1983, after their engineering consultant informed them that the Sacramento application had a transmitter site problem, each of them believed that that application would most likely be dismissed through settlement at some future time and they focused their attentions on their Orlando application. Tr. 728-33, 801-02, 852-53. In response to the ALJ's March 22, 1983 Orlando order requiring a written submission of their integration plan, FCC 83M-940, *supra*, Rey engaged in "frantic" phone calls with counsel and his partners and formulated the integration proposal, involving full-time participation by all three principals, that was submitted April 1, 1983. Tr. 674, 778-82, 873-74. The Sacramento proceeding was not discussed during these telephone conversations and was not on Rey's and Jaramillo's minds at this time since they still assumed that the Sacramento application would shortly be dismissed through settlement. Tr. 727-28, 735, 781-83, 866.

8. Although the Sacramento presiding officer had ruled on April 15, 1983 that a written integration plan had to be filed by April 28, Rey first became aware of this fact on April 27. Rey was unable to reach Jaramillo and developed by himself the proposal that was submitted on April 28 and which he regarded as a "hypothetical" or "academic exercise" because he believed that the Sacramento application would soon be dismissed. Tr. 675-77, 782-91, 808, 812-13, 850-51, 869. Both Rey and Jaramillo were proposed for full-time management roles at the Sacramento station, but Rey's participation was made secondary to his Orlando integration promise. See para. 6, *supra*. However, Jaramillo's Sacramento participation proposal was given priority over her Orlando plan in the event that the Sacramento application were granted. *Id.* Rey

subsequently spoke with Jaramillo who orally ratified this integration plan, but who also believed the Sacramento submission to be "hypothetical" because negotiations were underway to achieve a settlement and dismissal of the application. Tr. 677-78, 700-04, 736-40, 746, 800. The condition that Jaramillo would abandon the Orlando [**99 FCC 2d 693**] station should that application be granted "within three years following the initiation of the operation of the Sacramento station" was apparently inserted on advice of counsel to avoid a potential "trafficking" violation[2] and was regarded by Rey as a "legal technicality" that he did not understand. Tr. 794-96, 805-07. Also, in his April 27 conversation with counsel, Rey suggested that the ALJ in the Orlando proceeding be informed of the Sacramento submission, and counsel proposed that the information be supplied with the change of address amendment he was going to file the next day. Tr. 789, 876-77. This was done—the ALJ and the other parties were informed of Jaramillo's formal primary integration pledge to Sacramento—but the three-year contingency was inexplicably omitted. See para. 6, *supra*. In their direct written testimony, notarized on July 27 and 28, 1983, respectively, Rey and Jaramillo did not indicate that their proposals to participate fulltime in Rainbow's station management were in any manner contingent upon the outcome of the Sacramento proceeding. Rainbow Exhs. 1, 2, 4. However, they testified that in

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[2] Section 73.3597(a) through (d) of the Rules, 47 CFR 73.3597(a)-(d), formerly comprised the "three-year rule" which required an application for broadcast license assignment or transfer submitted prior to completion of a three-year holding period to be designated for hearing unless specified extenuating circumstances were present or a waiver petition was found to be meritorious. *Transfer of Broadcast Facilities*, 52 RR 2d 1081, 1082 (1982). However, effective December 14, 1982, this rule, and its underlying policy against "trafficking" in broadcast licenses, was eliminated by the Commission and in its place a one-year holding period after commencement of operation was imposed on those who obtain a permit as a result of a grant through comparative hearing. *Id.* at 1086, 1089; 47 Fed. Reg. 55924.

preparing these exhibits they regarded the Sacramento application as dismissed because a settlement agreement had been reached in June and revised slightly and reexecuted in July. Tr. 754-55, 843-45. The settlement agreement was filed in the Sacramento proceeding on July 29, 1983, and shortly thereafter the presiding officer formally approved the agreement and dismissed the El Dorado application. *Trefoil Broadcasting Co., Inc.*, FCC 83M-2657, released August 11, 1983.

9. Based on the preceding review of the record evidence, we hold that the ALJ erred in disqualifying Rainbow. A finding of disqualifying misrepresentation or lack of candor requires evidence of a willful intent to deceive, mislead, or conceal. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137, 50 RR 2d 1321, 1325 (Rev. Bd. 1982), *modified*, 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (Comm'n 1983). *See also Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 723, 54 RR 2d 989, 996 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551, 55 RR 2d 424 (Rev. Bd. 1984); *Garrett, Andrews and Letizia, Inc.*, 86 FCC 2d 1172, 1177, 49 RR 2d 1001, 1005 (Rev. Bd.), *modified on other grounds*, 88 FCC 2d 620, 50 RR 2d 802 (Comm'n 1981). We find no evidence of such wrongful intent here. In departing from the [**99 FCC 2d 694**] ALJ's determination that Rainbow principals Rey and Jaramillo intentionally misrepresented Jaramillo's management role and concealed their inconsistent Sacramento integration proposal (I.D., Findings, paras. 9, 18, and note 7; Conclusions, paras. 6-8 and note 18), we are not unmindful that the Commission is "generally reluctant to overturn the credibility determinations of an ALJ unless his findings are patently in conflict with the record evidence." *Country Broadcasting Company*, 93 FCC 2d 83, 88, 53 RR 2d 293, 297 (Rev. Bd. 1983); *accord, Old Time Religion Hour, supra*, 95 FCC 2d at 722, 54 RR 2d at 996. Here, however, the ALJ has made no adverse demeanor findings and has not found the testimony of Rey or Jaramillo to lack credibility; without any solid

evidentiary support for his conclusions he has, we believe, mischaracterized the import of their testimony and drawn erroneous inferences of fact.

10. Thus, for instance, we cannot uphold the ALJ's determination (I.D., Findings, para. 18) that

> Rey and Jaramillo took the position that the misrepresentation was made to Judge Kuhlmann [the Sacramento presiding officer] and not to the Orlando Presiding Officer, but that it was all right to be less than candid with Judge Kuhlmann, since they intended to dismiss the Sacramento application in any event.

We can find no record support for this conclusion, and we believe it mischaracterizes their record testimony that they viewed their Sacramento integration proposal as "hypothetical" (because they were negotiating a settlement agreement which would result in the dismissal of the Sacramento application) but would nevertheless implement that integration proposal in the unlikely event that the application were granted. See para. 8, *supra*. Contrary to the ALJ's implication, there is no evidence to suggest that El Dorado would not have carried out its integration commitment had its application not been dismissed.[3] Other findings by the ALJ in like vein, *e.g.*, that Mr. Rey was "well aware that he has been less than candid with the Commission" (I.D., n. 7), that "Mrs. Jaramillo misrepresent[ed her] role . . . in Rainbow" (I.D., note 18), and that

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[3] In addition, the ALJ's finding (I.D., Findings, para. 9) that Rey and Jaramillo knew at the time they filed Rainbow's application on September 9, 1982 that they would have to file an integration proposal in each market is not supported by Rey's testimony at Tr. 673, upon which it is purportedly based. Instead, the totality of the testimony reveals their state of mind on the date in question to be primarily focused on prosecuting Rainbow's Orlando proposal because they viewed the El Dorado Sacramento application as having only a remote chance of being granted. See para. 7, *supra*.

Rainbow "dissembled" (I.D., Cncls., para. 6) and "misrepresented" (*id.*, para. 7) are also entirely conclusory and simply lack factual support.[4] We [**99 FCC 2d 695**] are therefore obliged to perform "our statutory duty to act in the public interest" by rejecting these findings which are "patently in conflict" with the record evidence. *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1045, 24 RR 2d 369, 381 (1972); *see Lorain Journal Co. v. FCC*, 351 F. 2d 824, 828 (D.C. Cir. 1965).

11. Instead, we find that the uncontroverted record evidence (see paras. 5-8, *supra*) shows a complete absence of any intent by Rainbow or its principals to conceal their ownership integration plans or to deceive or mislead the Commission in this regard. Any potential motive to conceal its principals' Sacramento plans in order to achieve some tactical advantage at the Orlando hearing is not supported by even one evidentiary shred. Through 238 pages of hearing testimony (Tr. 650-888), Rey and Jaramillo adhered consistently to their explanation that the April 1, 1983 Orlando integration pledge was submitted to the ALJ without any thought of filing an intentionally inconsistent proposal in Sacramento, which they considered largely hypothetical in any event because of the expected settlement; and, on April 28, when Rey filed the Sacramento plan which modified the Orlando submission, Rainbow immediately informed the Orlando ALJ of that modification as well as of the specifics and basic contingencies per-

[4] We also note the ALJ's findings that "no legal partnership" was ever formed for El Dorado and was not formed for Rainbow until the hearing was underway, I.D., nn. 4 and 5. These findings are without any decisional importance because they neither support the ALJ's lack of candor conclusions nor reveal any legal defect in the applicant Rainbow. *Cf. High Sierra Broadcasting, Inc.*, 56 RR 2d 1394, 1396 (Comm'n 1984). Indeed, no issue pertaining to legal qualifications was specified with regard to either the El Dorado or Rainbow application.

taining to both proposals.[5] Also, Rainbow's omission in its April 28 statement of the three-year Jaramillo contingency plan appears inadvertent and unintentional, particularly since her contingent commitment to Sacramento was spelled out otherwise.[6] In these circumstances, no more than a slight comparative demerit against Rainbow could possibly be warranted—and then only for its principals' carelessness or inattentiveness in not realizing earlier, *i.e.*, at the time they submitted their April 1, 1983 integration plan, the need to delineate their Sacramento proposal which, when finally put together and submitted, contained contingencies and weakened their Orlando proposal. *See Merrimack Valley Broadcasting, Inc.*, FCC 84-496, released October 23, 1984, at note 9; *compare Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 947, 50 RR 2d 1142, 1145 (Rev. Bd. 1982) (no demerit assigned for an inadvertent [**99 FCC 2d 696**] omission of a decisionally insignificant matter) *and Town and Country Radio, Inc.*, 70 FCC 2d 572, 575-6, 44 RR 2d 149, 153-54 (Rev. Bd. 1978) (minor demerit for unintentional but careless reporting violations) *with Radio Station WABZ, Inc.*, 90 FCC 2d 818, 827, 51 RR 2d 1507, 1515 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F. 2d 756 (D.C. Cir. 1983) (moderate demerit for numerous reporting violations reflecting "an inattention to . . . reporting requirements"). However, as we recently discussed in *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984) (Separate

[5] These facts contrast sharply with *Old Time Religion Hour, supra*, 95 FCC 2d at 722-23, 54 RR 2d at 996, where testimonial lack of candor was evidenced by changes in explanations and by inconsistencies, confusion, and convenient lack of recall of recent events.

[6] In any event, the three-year contingency is not decisionally significant. Because Jaramillo's proposed Orlando integration as revealed here on April 28, 1983 was made secondary to her Sacramento proposal and, thus, contingent on the actual dismissal of the Sacramento proposal. Rainbow can receive no credit for her proposed participation in station management—even without reference to the "three-year" proviso. See para. 22, *infra*.

Statement *En Banc*), Commission procedures for considering "contingent" applications and "contingent" integration proposals are far less than pellucid. Consequently, we cannot ultimately fault Rainbow for what we perceive to be a sincere and reasonably prompt, if imperfect, attempt to make full disclosure of the contingent Orlando-Sacramento integration plans of its principals. Accordingly, we will not assess Rainbow a comparative demerit.

12. *Section 307(b) Issue.* Metro and Rainbow propose Orlando, Florida as their community of license; the applicant Winter Park proposes to serve the contiguous community of Winter Park. I.D., Fdgs., paras. 22, 27. Orlando is a major city in east central Florida, has a 1980 population of 127,662, and is served by Orlando International Airport and by two major nationwide bus lines, a railroad, and several motor and freight carriers. *Id.*, para. 23. It is a major tourist center, has its own mayor and city council, has a labor force of about 70,000 people, and has a major daily newspaper and four weeklies. *Id.*, paras. 24-25. Orlando has twelve AM and FM radio stations and four television stations licensed to it. *Id.*, para. 26.

13. Winter Park is an integral part of the Orlando urbanized area, abuts the city of Orlando, and has a 1980 population of 22,339. *Id.*, para. 27. The center of Winter Park is less than 5 miles from the center of Orlando, and the two communities are served by a common local bus system. *Id.*, paras. 23, 27. Winter Park has its own mayor and city council, has a labor force of 12,000 people, and has a weekly newspaper, *Id.*, paras. 28-29. Although Winter Park has four AM and FM radio stations licensed to it, it has no local television station. *Id.*, para. 30. The ALJ, relying on *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983 (Comm'n), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984), and *Buena Vista Telecasters of Texas, Inc.*, 94 FCC 2d 625, 54 RR 2d 562 (Rev. Bd. 1983), held that although Winter Park nominally proposed a first local

television station while Metro and Rainbow proposed a fifth such outlet, no applicant merited a Section 307(b) preference in this proceeding. I.D., Cncls., paras. 9-10.

14. In its exceptions, Winter Park urges that it should have been awarded a decisive Section 307(b) preference for proposing a first local [**99 FCC 2d 697**] television service to Winter Park. It stresses that its Exhibit 9 establishes firmly that Winter Park is a separate city from Orlando, having different demographic characteristics and needs, and should therefore be preferred under the mandate of Section 307(b). Winter Park further claims that *Cleveland Television, supra*, does not bar it from obtaining a decisive Section 307(b) preference simply because its proposed community is smaller than and adjoins Orlando, the community proposed by its competitors. We disagree.

15. Initially, we point out that Winter Park's strenuous effort to demonstrate that its proposed community of license is a city independent politically, sociologically, and to some extent economically from Orlando, Winter Park Br. at 25-35, is inadequate to establish *simpliciter* that it should be preferred for proposing a first local *television* station there. In fact, the Commission's previous licensing of AM and FM broadcast stations to the city of Winter Park demonstrates clearly its recognition of that city as a separate community entitled to its own local *radio* transmission outlets. Instead, the focus must be on whether a Section 307(b) choice should be made here in the context of a comparative *television* proceeding. That determination, in turn, depends on the concept of "community" as it applies in television cases. For, as the Commission has long recognized:

> [T]he concept of communities within the meaning of Section 307(b) has not been limited to municipalities, but in any given case has been determined by a combination of circumstances. The type of facility sought, the coverage each applicant would provide and the

location and importance of the municipality in relation to nearby cities and towns have been among the factors considered in determining the applicability of 307(b). See *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 7 R.R. 2030; *Rossmoyne Corp.*, 7 R.R. 117; *Huntington Broadcasting Co.*, 5 R.R. 721, *Pawtucket Broadcasting Co.*, 4 R.R. 1345. In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term "communities," as used in this section of the Communications Act, is not limited in meaning to "municipalities" but may include metropolitan areas.

St. Louis Telecast, Inc., 22 FCC 625, 712-13, 12 RR 1289, 1369 (1957) *quoted in Cleveland Television, supra*, 91 FCC 2d at 1136, 52 RR 2d at 587. In *Cleveland Television*, a proceeding involving a choice between television applicants proposing Cleveland, Ohio or the contiguous suburb of Shaker Heights as their principal community of license, we held that metropolitan Cleveland was in reality the one large community being applied for, and we awarded no Section 307(b) preference to either applicant. 91 FCC 2d at 1137, 52 RR 2d at 587. Our conclusion followed from analyzing the economic and allocation policy differences between the television and aural broadcast services:

> Television stations, unlike radio, are not divided into classes depending on the size of their coverage areas, and the allocations scheme for television (Sixth Report and [**99 FCC 2d 698**] Order, [41 FCC 148, 167 (1952)]) specifically provides for central cities with large populations to have multiple channel assignments. . . . Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these

> differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artificial political boundaries." *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972). Therefore, television stations--unlike FM broadcast stations—are generally considered as providing "an areawide, rather than a localized service." *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369.

Id.

16. We affirm the ALJ's refusal to award a Section 307(b) preference here. The preceding case excerpts make clear that *Cleveland Television* is firmly rooted in established Commission and court precedent, and we agree with the ALJ that its rationale squarely controls the facts of the instant case. Winter Park is a small city abutting Orlando, which is more than five times its size. All three applicants will place a Grade B signal over the metropolitan Orlando area, including the city of Winter Park. Jt. Engineering Exh. 2; Winter Park Exh. 10. Each will serve over 1 million persons. I.D., Fdgs., para. 19. Under these circumstances, the economic need of a television station to attract sizeable advertising revenues to cover the significant costs involved in its ongoing operation creates a strong presumption—unrebutted in this record—that each applicant will serve the entire Orlando metropolitan area. We therefore will not award a Section 307(b) preference to Winter Park. *See Cleveland Television, supra; cf. Buena Vista Telecasters of Texas, supra* (television applicants for Garland and Richardson, Texas, approximately 1/7th and 1/12th the size of neighboring Dallas, held to be applicants for the metropolitan Dallas-Fort Worth urbanized area and

therefore neither would merit a §307(b) preference).[7] [99 FCC 2d 699]

17. *Contingent Comparative Issue: Diversification.* The ALJ awarded no preference to any applicant for diversification of control because he found that none held any attributable media interests. I.D., Fdgs., paras. 34-35; Concls., paras. 13-14. This determination accurately reflects the record evidence and, because no exception to it has been lodged by any applicant, it is final. 47 CFR 1.277(a).

18. *Comparative Coverage.* The ALJ found that Rainbow would provide a fourth television service to 5,323 people in 247 square miles (sq. mi.) and a fifth service to 239,148 people in 1,190 sq. mi.; Metro would provide a fourth service to 4,747 people in 196 sq. mi. and a fifth to 238,764 persons in 1,095 sq. mi.; and Winter Park would render a fifth service to 103,395 people in 510 sq. mi. I.D., Fdgs., para. 20. Also, Rainbow would serve overall 1,476,047 peo-

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[7] We also reject Winter Park's assertion (Br. at 35) that it should receive a preference for its allegedly "unusually good programming service to all those *receiving* service from the station." *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 810 n.5, 51 RR 2d 409, 416-17 n.5 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983, *appeal pending*, D.C. Cir. No. 83-2067, filed October 11, 1983, citing *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955) which "precludes the consideration of proposed programming evidence in a Section 307(b) case." The proper focus of a needs showing is on the need of a proposed community of license for a local outlet, not on the uniqueness or excellence of a proposed program service *per se*. *Central Broadcasting Co.*, 3 RR 2d 594 (Rev. Bd. 1964). Winter Park also states that the ALJ impermissibly relied on the rulemaking assignment of the contested channel to Orlando rather than Winter Park as a reason for denying it a Section 307(b) preference. The rulemaking in this case, however, did not foreclose the subsequent Section 307(b) determination, *see WHW Enterprises*, 89 FCC 2d at 811 n.6, 51 RR 2d at 417 n.6; *Campbell and Sheftall*, 7 FCC 2d 658, 9 RR 2d 999 (Rev. Bd. 1967), and the ALJ's holding was largely predicated on the cases cited at para. 13, *supra*.

ple in 8,105 sq. mi.; Metro, 1,443,470 people in 7,598 sq. mi.; and Winter Park, 1,116,211 people in 5,893 sq. mi. *Id.*, para. 19. The ALJ determined that Rainbow deserved a slight comparative coverage preference over Metro and that both of these applicants, in turn, merited a substantial preference over Winter Park. *Id.*, para. 21; Concls., para. 12. We will reduce the comparative coverage preference awarded Metro and Rainbow over Winter Park to a slight to moderate one because, although their fourth and fifth services and overall coverage are substantially greater, they will not provide a first or second reception service to anyone. *See Christian Broadcasting of the Midlands, Inc.*, 57 RR 2d 87, 91-92 (Rev. Bd. 1984), and cases cited therein. As between Rainbow and Metro, we find that the minor coverage differences are too insubstantial to merit any preference. *Cf. Alessandro Broadcasting Company*, 56 RR 2d 1568, 1571-72 (Rev. Bd. 1984) (minor reception advantages too insignificant to provide a meaningful Section 307(b) preference).

19. *Integration of Ownership and Management.* The ALJ awarded Metro 99% credit for proposing the full-time participation of five individuals who each own 19.8% of its voting stock: Arthur Grindle, general manager; William C. Coleman, Jr., director of programming and operations; James W. Hickman, director of finance; Elmer Neal Lincoln, director of sales; and David L. Peoples, director of public affairs and community relations. I.D., Fdgs., paras. 36-59; Concls., para. 15. Grindle is a civically-active long-term resident of the proposed service area and has some broadcast experience. He is also a member of the Florida House of Representatives, which meets at least two months per year. Coleman is a long-term Orlando resident, participates some in civic affairs, and has some broadcast experience. Hickman is a longterm service area resident with some civic activity. Lincoln lived in the service area from 1975-83, will [99 FCC 2d 700] return to Orlando if Metro's application is granted, and is a Black male. Peo-

ples has lived in the service area since 1974 and in 1983 moved to Orlando; he is civically active. The ALJ found that Rainbow would integrate full time Joseph Rey, an 85% general partner, as general manager, and Rey's mother, Esperanza Rey-Mehr, a 5% general partner, as director of Hispanic affairs; he rejected as inconsistent with her Sacramento integration pledge the proposed integration of Leticia Jaramillo, a 10% general partner, as full-time program manager. I.D., Fdgs., paras. 12, 60-68. Mr. Rey will move to Orlando if Rainbow's application is granted; Mrs. Rey-Mehr has been an Orlando resident since 1978. Both are Hispanic and, of course, Mrs. Rey-Mehr is female. Mr. Rey has significant past broadcast experience. Winter Park, in turn, was credited only for the part-time (20 hours per week) integration of Hal H. Kantor, a 10% stockholder, as general manager. *Id.*, paras. 69-71. Mr. Kantor has been an Orlando resident since 1972 and has some civic involvement. The ALJ did not compare Rainbow's integration proposal with those of its opponents but did award Metro a "clear and decisive" overall integration preference over Winter Park. *Id.*, Concls., para. 15.

20. In their exceptions, Rainbow and Winter Park challenge Metro's ability to effectuate its 99% full-time integration proposal. We disagree with this contention except as it relates to Metro principal Arthur Grindle, as will be discussed at paragraph 21, *infra*. First, we reject Rainbow's claim (Br. at 32-33) that Metro stockholder James Hickman's full-time integration commitment is unreliable because of an alleged conflict in his testimony as to how many hours per week he is currently working. Tr. 390-426. Hickman essentially stated that he had recently begun cutting back sharply his commitments to time-consuming projects that could have interfered with his ability to work at the station, reaffirmed his intention to work at least 40 hours per week in station management, but also indicated that he was a "workaholic" who "had been working a 40 hour week for a long time." In short, Hickman's

testimony is fully consistent with, and supportive of, his integration pledge, and will therefore be credited. Second, Rainbow claims (Br. at 33-34) that Metro principal Elmer Lincoln will not be able to effectuate his full-time integration proposal principally because of his current time-consuming involvement in his automobile dealership. We reject this contention because of his unrefuted commitment to turn complete control over the management of that business to his recently hired general manager trainee and, should this arrangement prove unsatisfactory, to sell the business. Metro Exh. 8 at 3; Tr. 287. Similarly, we deny as unsupported by the record evidence Winter Park's broad assertion (Br. at 46, 47-48) that the current business interests of Metro principals William Coleman, David Peoples, and James Hickman make their integration proposals unlikely to be effectuated. *See* **[99 FCC 2d 701]** *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 585-589, 51 RR 2d 1478, 1480-483, *recon. denied*, 92 FCC 2d 94, 51 RR 2d 1383 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983, *recon. denied*, FCC 84-73, released March 15, 1984, *appeal pending sub nom Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir., filed October 21, 1983).

21. Nevertheless, we believe that some reduction in Metro's integration credit is in order for Arthur Grindle's proposed participation as general manager. As Rainbow (Br. at 31) and Winter Park (Br. at 46-47) contend, the uncontroverted record evidence shows that Mr. Grindle, as a member of the Florida House of Representatives with several subcommittee assignments, will have to spend two months per year at the state capital, Tallahassee. I.D., Fdgs., paras. 40, 43-44 and n. 14. Because the Commission emphasizes that ownership participation in management is most meaningful when rendered on a full-time and day-to-day basis and that credit given for it drops sharply to the extent time spent moves away from full time, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d

393, 395, 5 RR 2d 1901, 1909 (1965), we shall award Metro part-time credit only for Grindle's integration because of his necessary public commitment to be absent two months a year from the station. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 950-51, 50 RR 2d 1142, 1147 (Rev. Bd. 1982) (applicant awarded part-time credit only for proposed 40-hour per week management participation of owner who will take three to four month vacations every year). In total, Metro is credited with 79.2% full-time plus 19.8% part-time quantitative integration.[8] **[99 FCC 2d 702]**

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[8] We also have considered and now reject:

(a) Rainbow's attack (Br. at 24-26) on Metro's integration based on the collateral integration promises of its principals made in the Cape Coral, Florida television proceeding. Metro's principals have testified here that their Orlando commitments take precedence over their Cape Coral pledges. Tr. 290-93, 368. *See* para. 25, *infra*.

(b) Rainbow's description (Br. at 26-30) of Metro's corporate structure, which involves voting and non-voting classes of stock, as a "sham." It has failed to specifically allege or show that Metro's stockholders vote in percentages that vary from their actual ownership as revealed on the "B" cut-off date. Its allegation that non-voting stockholders attend stockholder meetings does not establish that they actually vote or have otherwise retained the right to vote. Under the facts of this case, the ALJ properly based his award of integration credit on the amount of voting stock owned. *See Bradley, Hand and Triplett*, 89 FCC 2d 657, 662, 51 RR 2d 383, 387 (Rev. Bd. 1982).

(c) Winter Park's claim (Br. at 43-45) that Metro and Rainbow should receive no integration credit because their proposals were submitted after the "B" cut-off date in this proceeding. Because both the old and the new versions of the application form, FCC Form 301, do not expressly call for an applicant's complete integration proposal, Commission practice has been to permit such proposals to be filed at the hearing. *See WHW Enterprises, supra* note 7, 89 FCC 2d at 817, 51 RR 2d at 421; *cf. Vacationland Broadcasting Co., Inc.*, 55 RR 2d 1299, 1304 (Rev. Bd. 1984) (in the future, applicants must specify precise hour-per-week integration proposals in direct written cases), *recon. denied*, 56 RR 2d 1260. *But see* note 9, *infra*.

22. Rainbow also avers (Br. at 21-24) that the ALJ erroneously struck its Exhibit 2 which contains Ms. Jaramillo's testimony that she will be integrated full time at the proposed Orlando station. Rainbow points out that her testimony indicates unequivocally that she will fulfill her Orlando integration commitment and that the collateral Sacramento application filed by El Dorado, to which she had on April 28, 1983 nominally pledged her primary managerial loyalty, was dismissed on August 11, 1983, prior to commencement of this hearing. See paragraphs 5-6, 8, *supra*. Therefore, Rainbow seeks additional 10% quantitative integration credit which corresponds to Ms. Jaramillo's ownership share. Although we do not believe that the ALJ should have stricken her written testimonial exhibit, we nevertheless affirm the ALJ's conclusion not to credit Rainbow for Ms. Jaramillo's proposed integration. During the time period begining April 28, 1983 when Ms. Jaramillo first proposed primary fealty to Sacramento and August 11 when the El Dorado application was dismissed, her integration commitment to Orlando was stated to the Commission to be secondary to her Sacramento pledge. Moreover, she testified in this proceeding that if the settlement in Sacramento had failed and El Dorado's application been granted, she would have fulfilled her pledge to serve as general manager at Sacramento and cancelled her alternative plan to be Rainbow's program manager. See paragraph 8, *supra*; Tr. 703-04, 740-41, 752-53. In other words, her Orlando plans were made contingent on the dismissal of the El Dorado application, an event which Rainbow could have prevented by simply opting not to enter into the subsequent settlement agreement. That Rainbow voluntarily chose another course does not render her proposal any less "conditional and uncertain" than the one rejected by the Board in *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 431, 55 RR 2d 627, 634 (Rev. Bd. 1983), *review denied*, 56 RR 2d 1394 (1984). Accordingly, as in *High Sierra*, we shall award no credit for such a

contingent integration proposal. We therefore award 90% full-time quantitative credit to Rainbow for the proposed participation of Joseph Rey and Esperanza Rey-Mehr.[9] [**99 FCC 2d 703**]

23. *Integration Summary.* Metro has been credited with 79.2% full-time plus 19.8% part-time quantitative integration credit; Rainbow, 90% full-time credit; and Winter Park, 10% part-time only credit. Both Metro and Rainbow are therefore awarded substantial preferences over Winter Park which has no full-time credit and cannot overcome its overwhelming quantitative deficit with qualitative enhancements. *See Cleveland Television, supra*, 91 FCC 2d at 1141, 52 RR 2d at 590; *New Continental Broadcasting Company*, 88 FCC 2d 830, 850, 50 RR 2d 1117, 1133 (Rev. Bd. 1981), *remanded on other grounds*, 93 FCC 2d 1275, 53 RR 2d 1004 (Comm'n 1983). There is thus no need to

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[9] We also reject Rainbow's exception (Br. at 22-23 n. 13) to the ALJ's *Order*, FCC 83M-940, *supra*, requiring the applicants to submit their integration proposals prior to commencement of the hearing. Rainbow attacks this ruling as "impermissible compulsory discovery." We disagree. Although the Board has permitted information not called for by the application form to be first supplied at hearing in an applicant's direct written case, *see WHW Enterprises, supra*, we specifically approve of the procedure employed here as a proper exercise of the ALJ's plenary authority pursuant to Section 1.243 of the Rules, 47 CFR 1.243, to regulate the course of the hearing. *See Wind River Communications, Inc.*, 55 RR 2d 579 (Rev. Bd. 1984); *see also Ruarch Associates*, 56 RR 2d 1593, 1595 n. 3 (Rev. Bd. 1984); *Service Electric Cable TV, Inc.*, 37 FCC 2d 119, 122 n. 14, 25 RR 2d 135, 139 n. 14 (Rev. Bd.), *aff'd*, 37 FCC 2d 583, 25 RR 2d 595 (Comm'n 1972). We believe that the comparative hearing process is improved when the presiding officer issues a formal order that requires all the applicants to submit complete, written statements of their principals' ownership participation plans, including their precise hour-per-week commitment to station management, their proposed roles, and a complete itemization of all qualitative enhancement credits claimed. Such a prehearing submission provides all parties with information needed to assess their comparative chances of prevailing at hearing and thereby not only expedites matters but also encourages earlier settlements and lessened litigation.

consider further Winter Park's enhancement credit. Rainbow is quantitatively ahead of Metro, and while its 10.8% advantage is probably a "clear" enough difference to be decisional, *see New Continental, supra* (12.5% differential is "clear"), we conclude that it is also ahead qualitatively. In particular, Rainbow is awarded a substantial preference for minority participation by 90% of its stock ownership (Mr. Rey and Mrs. Rey-Mehr) in contrast with Metro's 19.8% credit for Mr. Lincoln. *See Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1264, 52 RR 2d 1063, 1067 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984). It also receives a solid broadcast experience preference because the past broadcast experience of its 85% principal Mr. Rey is much more significant and attaches to larger ownership than that of Metro principals Coleman (19.8% owner participating full time) and Grindle (19.8%, part-time). Finally, it is very slightly ahead on female ownership participation (5% for Mrs. Rey-Mehr v. 0% for Metro). *See KIST Corp.*, 57 RR 2d 49, 65 (Rev. Bd. 1984). On the other hand, Metro is awarded a moderate preference for superior local residence and civic participation because of (a) the long-term local residence of Mr. Coleman as further enhanced by his involvement in some civic activity; (b) the long-term service area residence of Mr. Hickman as further enhanced by his involvement in some civic activity; (c) the moderate-term service area and short-term local residence and civic activity of Mr. Peoples; and (d) the moderate-term service area and [**99 FCC 2d 704**] proposed future residence of Mr. Lincoln. In addition, it receives slight additional credit because its 19.8% part-time participating principal, Mr. Grindle, is a civically-active local resident. By comparison, Rainbow is credited for the proposed future residence of an 85% owner, Mr. Rey, and the local residence since 1978 of a 5% owner, Mrs. Rey-Mehr. The size of Metro's preference is less than maximal largely because less than half (39.6%) of its full-time participating ownership has long-

term residence, either locally or in the service area, and only half of that amount represents residence that is truly local. *See Policy Statement*, 1 FCC 2d at 396, 5 RR 2d at 1910 (Commission prefers longer term residence); *Waters Broadcasting Corporation, supra*, 91 FCC 2d at 1263, 52 RR 2d at 1066 (service area residence "closely follows" in importance local residence). We conclude that, although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage. *Cf. Phoenix Media Corp.*, 56 RR 2d 1241, 1249-50 (Rev. Bd. 1984). Therefore, based on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro. *See New Continental Broadcasting Co., supra.*

24. *Auxiliary Power.* The ALJ rejected Metro Exh. 4 and Rainbow Exh. 5 which proposed auxiliary power, because he was aware of no precedent awarding such a preference in television cases. Tr. 98-104; 656-57. Based on our recent decisions in *San Joaquin Television Improvement Corp.*, 96 FCC 2d 594, 604, 54 RR 2d 1206, 1214 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 617, 55 RR 2d 1186 (Rev. Bd. 1984), and *Minority Broadcasters of East St. Louis, Inc.*, 56 RR 2d 275, 283 (Rev. Bd. 1984), which applied the Commission's *Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966), to television cases, we overturn the ALJ's rulings and award Metro and Rainbow slight auxiliary power preferences over Winter Park. In so doing, we reject Rainbow's claim that Metro should receive no preference because it first proposed auxiliary power in its direct written case, which was filed considerably after the "B" cut-off date in this proceeding. As has long been the case with integration proposals, see notes 8 and 9, *supra*, the application form now no longer expressly requests auxiliary power information.[10] Therefore, Metro properly filed its proposal as part of its direct case. However, we point out that an ALJ, pursuant to his plenary authority to regulate the course of the hearing may require that auxiliary power as well as integration proposals be submitted at an earlier [**99 FCC 2d 705**] time. *See* notes 8 and 9, *supra*. Because no such requirement was set forth in the instant case, Metro's proposal was timely.

25. *Motion to Enlarge Issues.* Winter Park excepts (Br. at 37-41) to the ALJ's *Memorandum Opinion and Order*, FCC 83M-3715, released October 19, 1983, which denied its August 31, 1983 motion to enlarge issues. Winter Park had sought the addition of reporting and misrepresentation/lack of candor issues against Metro because it did not timely report in this proceeding the filing by its principals of an application for a television station at Cape Coral, Florida. The ALJ denied the motion because he found that Metro's failure to report was inadvertent, that the Cape Coral application reported the pendency of the instant Orlando application, and that Metro voluntarily disclosed the existence of the Cape Coral application when it exchanged its hearing exhibits in this case. *Id.* We deny Metro's exception because the record reveals no intent by Metro or its principals to conceal, deceive, or mislead; the Cape Coral application has proven to be decisionally insignificant here, *see* note 8, para. (a), *supra*; and there is no pattern of repeated violations or other circumstances reflecting the presence of significant carelessness or inattentiveness. *See Merrimack Valley, supra.* In any event, enlargement of the issues at this stage would be pointless because Metro is not comparatively the best applicant here.

26. *Conclusions.* All decisionally significant exceptions have been considered. Rainbow has been found to be basically qualified and no applicant has been awarded a pref-

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[10] Formerly, auxiliary power equipment had to be listed in the application item requiring a listing of costs for technical equipment.

erence under Section 307(b) or under the comparative factor of diversification of control. Rainbow has been given a slight integration preference over Metro, and both of these applicants have been awarded substantial integration, slight to moderate comparative coverage, and slight auxiliary power preferences over Winter Park, which therefore "shows" in third place. As between Rainbow and Metro, Rainbow's slight integration preference, based on both its quantitative and qualitative advantages, is sufficient to carry the day. *See New Continental, supra.* We therefore conclude that a grant of the Rainbow application will best serve the public interest, convenience, and necessity.

27. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed June 25, 1984 by Rainbow Broadcasting Company IS GRANTED, and the amendment IS ACCEPTED; and

28. IT IS FURTHER ORDERED, That the applica- [**99 FCC 2d 706**] tion of Rainbow Broadcasting Corporation (File No. BPCT-820909KF) for a new commercial television station at Orlando, Florida IS GRANTED, and the applications of Metro Broadcasting, Inc. (File No. BPCT-820707KE) and Winter Park Communications (File No. BPCT-820909KV) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS,
Member, Review Board

STATEMENT OF BOARD MEMBER
NORMAN B. BLUMENTHAL
Concurring *Dubitante*

Because, as the majority accurately observes at paragraph 11, *ante*, our recent statement attending *The Gene Sudduth Co., Inc.*, 56 RR 2d 1326, 1328 (Rev. Bd. 1984),

explains that our policy on "contingent" ownership integration proposals is amorphous and, hence, may have even invited some of the mischief narrated in paragraphs 4-11 of the *Decision*, I would not disqualify this winning applicant (Rainbow) for its pluck. On the other hand, I do not accept all of the findings and conclusions of the majority which tend to envelop the winning applicant's actions in miasma of guileless ignorance, nor do I join the characterizations, in the literal sense, of the ALJ's rulings relating to that applicant's maneuvers. (*See ante* paras. 9-10.) The ALJ's vigilance was salutary.

As ventilated in the *Gene Sudduth* appendix, the problem of "contingent" integration proposals is burgeoning; and the fact that it has taken the majority 6 pages to here unscramble Rainbow's clues as to its probable intentions is a testament to the emergent brain-twister "Proviso" which—like "Trivial Pursuit"—has spawned a jolly constituency. Just one, but far from unitary, example of how this frisky pastime operated in this single case is illustrated as follows. The dual Rainbow principals jointly filed virtually contemporaneous applications for a pair of widespread television channels, the first in Sacramento, California, the second in Orlando, Florida. Fulltime integration was, at various points, pledged by *both* principals at *both* stations. When forced to declare by the two different ALJs in the respective TV proceedings, one of the Rainbow principals (Rey) was depicted in an application amendment in the following Butterfly Straddle:

> Mr. Rey has also proposed to serve in a fulltime management role at the Sacramento station, but only to the extent that such involvement would not interfere with his commitment to serve as the fulltime general manager of the Orlando station.

See ante para. 5 Paragraphs 4-11 of the *Decision* are enlivened by similar hedgehopping by the second Rainbow principal (Jaramillo). We are told by Rainbow—in later

testimony—that one of the apparently inconsistent integration pledges was, by that time, " 'hypothetical' or 'academic exercise.' " (*See ante* para. 8.) Probably, but why was that fact not clearly **[99 FCC 2d 707]** spelled-out at the time of the pertinent filings?[1]

While we recently sought the Commission's assistance on this matter of "contingent" proposals in *Gene Sudduth*, it falls, perhaps, to the Board—the agency's appointed first line of review—to lay down the law (at least tentatively) so as to discourage the unchecked growth of such pestilence. Short of barring "contingent"—and certainly "hypothetical"[2]—integration proposals, a rather inflexible remedy,[3] I would urge:

1. That *no* credit be given to any integration pledge that is contingent on the outcome of another pending application (the outcome of which cannot be known for certain until all *certiorari* appeals are exhausted)[4];

2. That any "contingent" integration proposals be timely spelled out in *all* relevant proceedings, *particularly* the priorities, and that any ambiguities be construed most strongly against the propositioning party; and

3. That any patently inconsistent integration proposals on file at the same moment be considered a disqualifying misrepresentation.

[1] The answer is as obvious as it is cynical: Rainbow (by its California alter ego, El Dorado sought to maintain its "hypothetical" integration pledge in Sacramento for as long as it could get away with it so as to extract a larger settlement for dismissal of the El Dorado application. *See generally ante* para. 8.

[2] Maintenance of any "hypothetical" integration proposals should be regarded as abuse of process.

[3] This strict remedy has recently been set down by the Commission to apply when "contingent" applications would be *prima facie* inconsistent with our multiple ownership rules. *See Gene Sudduth; William H. Hernstadt*, 56 RR 2d 948 (M.M. Bur. 1984). The Media Bureau has wisely indicated that it would not waste the public's time and money nor that of competing applicants, by processing "contingent" applications, only one of which can be granted as prosecuted.

[4] The Board has properly applied that principle in this case. *See ante* note 6 and para. 22.

License applicants have been long admonished that: "As a licensing authority, the Commission is not expected to 'play procedural games with those who come before it in order to ascertain the truth.' " *RKO General v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1982) (citation and subsequent history omitted). Some applicant, soon, may become the victim of the fatal lack of candor finding so narrowly eluded by the peripatetic applicant here.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1988

No. 85-1755

Winter Park Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company,
Metro Broadcasting, Inc.,
Winter Park Chamber of Commerce and
City of Winter Park,
Intervenors

and Consclidated Case No. 85-1756

FILED APR 21 1989

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: EDWARDS, WILLIAMS and FRIEDMAN,* Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Communications Com-

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* of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

mission and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are denied, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Wendy Jennis
for CONSTANCE L. DUPRE, CLERK

Date: April 21, 1989
Opinion for the Court filed by Circuit Judge Edwards.
Opinion concurring in part and dissenting in part filed by Circuit Judge Williams.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1988

No. 85-1755

Winter Park Communications [sic]
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company, *et al.*,
Intervenors

And consolidated case No. 85-1756

[Filed Jun 21, 1989]

BEFORE: Edwards, Williams and Friedman, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Metro Broadcasting, Inc. and Winter Park Communications, Inc., it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
Constance L. Dupre, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Williams would grant the petition for rehearing of Metro Broadcasting, Inc.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 85-175

Winter Park Communications,
Appellant

v.

Federal Communications Commission,
Appellee

Rainbow Broadcasting Company, *et al.*,
Intervenors

And consolidated case No. 85-1756

[Filed Jun 21, 1989]

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of Metro Broadcasting, Inc. and Winter Park Communications, Inc. have been circulated to the full court. The taking of a vote was requested on the suggestion of Metro Broadcasting, Inc. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

FOR THE COURT:
Constance L. Dupre, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Silberman, Williams, D.H. Ginsburg and Sentelle would grant the suggestion of Metro Broadcasting, Inc.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States of America provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual time of War or public danger; nor shall any person be subject for the same offence to be put twice in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Section One and Section Five of the Fourteenth Amendment to the Constitution of the United States of America provide as follows:

> SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> • • •
>
> SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*,

Public Law Number 100-202, 101 Stat. 1329 (1987) are as follows:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C. 2d 1591, *as amended*, 55 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C.2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 are as follows:

> For necessary expenses of the Federal Communications Commission . . . *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, of to continue a reexamination of, the policies of the Federal Communications Commission with respect of comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d

607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .

The pertinent portions of the *Communications Amendments Act of 1982* Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982, 47 U.S.C. §§ 309 (i) (3) (A) - (4) (A):

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communication" included television, radio, cable television, multipoint distribution service, direct broadcast satellite service,

and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The commission [sic], not later than 180 days after the date of the enactment of the Communications Technical [sic] Amendments Act of 1982, shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 85-1755

Winter Park Communication, [sic]

Appellant

v.

Federal Communications Commission,

Appellee

and consolidated case No. 85-1756

United States Court of Appeals
For the District of Columbia Circuit

FILED MAR 17 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Edwards and Williams, Circuit Judges, and Circuit Judge Friedman, U.S.C.A. for the Federal Circuit

ORDER

Upon consideration of Metro Broadcasting, Inc.'s motion for leave to file supplemental brief, and the opposition thereto, it is

ORDERED that the aforesaid motion be denied. The Clerk is directed to return the lodged supplemental briefs to counsel for Metro Broadcasting, Inc.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

/s/ Fred A. Braun
By: Fred A. Braun
Deputy Clerk

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W. FCC 86-387
WASHINGTON, D.C. 20554 36874

News media information 202/254-7674.
Recorded listing of releases and texts 202/832-0002

September 15, 1986

COMMISSION GIVES DIRECTIONS CONCERNING COURT BRIEF IN STEELE V. FCC, NO. 84-1176 (D.C. CIR.)

On November 22, 1985 the United States Court of Appeals for the District of Columbia Circuit directed the Commission to address two issues in the case of *Steele* v. *FCC*, No. 84-1176:

1) whether the FCC has statutory authority to grant a limited preference for integrated ownership-management by women applicants in comparative license proceedings.

2) whether such a grant is constitutional.

This Commission has continued the practice of awarding racial and gender preferences without addressing these issues heretofore, because it thought such preferences to be required as a result of the Court's decision in *TV-9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Having now reviewed these issues at the court's invitation, the Commission is concerned that its policies in this area do not at present satisfy constitutional and statutory legal requirements.

As the Commission understands the law, racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an "exceedingly

persuasive justification." *Mississippi Union* [*sic*] *for Women* v. *Hogan*, 458 U.S. 718, 724 (1982). The Commission has relied upon the "reasonable expectation" standard imposed by the court in *TV-9*, and it therefore has never ascertained whether there was an exceedingly persuasive justification for its preference policies. Therefore, the Commission has directed the General Counsel to make these views known to the court and seek to have the *Steele* case remanded for further consideration.

The Commission did not address the issue of whether a policy giving preferences to women and minorities could ever be constitutional, that is, whether an exceedingly persuasive justification could in fact be established. The Commission anticipates looking at this issue and instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*.

Action by the Commission September 12, 1986. Commissioners Fowler (Chairman), Quello, Dawson, Patrick and Dennis.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 89-157
2857

News media information 202/832-5050.
Recorded listing of releases and texts 202/832-0002

May 15, 1989

COMMISSION FILES PETITION FOR REHEARING *EN BANC* IN *SHURBERG* v. *FCC*

On March 31, 1989, a divided panel of the U.S. Court of Appeals of the D.C. Circuit struck down the distress sale policy as unconstitutional, in *Shurberg Broadcasting of Hartford, Inc. v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, to instruct the General Counsel to petition the court for rehearing *en banc* and, in so doing, to defend the constitutionality of the distress sale policy.

In accordance with these instructions, the General Counsel today filed with the court a petition for rehearing reflecting the views of Commissioners Quello and Dennis. Chairman Patrick has set forth his dissenting views in a statement attached to this Notice.

Action by the Commission May 15, 1989, by Public Notice (FCC 89-157). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement.

[4 FCC Rcd 4511]
Dissenting Statement
of
Chairman Dennis R. Patrick

In re: Petition for Rehearing and Suggestion For Hearing En Banc filed in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir.)

The issue before the D.C. Circuit in both *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir., Mar. 31, 1989), and *Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir., Apr. 21, 1989), properly framed, is whether the court's opinion in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1975), remains valid in light of subsequent Supreme Court decisions. *See City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Had my fellow Commissioners agreed to discuss *all* relevant case law when requesting the court to examine this issue, I would have unhesitatingly agreed.

The Commission's minority preference policies have a tortured past. The Commission initially took the position that minority preferences should be granted only after the minority applicant clearly demonstrated that program and viewpoint diversity would be fostered through minority ownership. After being directed by the D.C. Circuit to presume a nexus between minority ownership and program diversity,[1] the Commission developed various preferences designed to promote minority ownership, including the distress sale policy at issue in *Shurberg*, the comparative preference policy and the tax certificate policy. *See Policy Statement on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 (1978). The Commission later extended

[1] *TV 9, Inc. v. FCC*, 495 F.2d 929, (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

the comparative preference policy to females. *See Mid-Florida Television Corp.*, 69 F.C.C. 2d 607, 652 (1978). The constitutionality of that policy was challenged in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated and rehearing en banc granted*, Order of Oct. 31, 1985, *remanded* Order of Oct. 9, 1986. At that point, the Commission believed that "both the gender and racial preference schemes conflict with equal protection standards under the Constitution." Supplemental Brief for the Federal Communications Commission at 13, *Steele v. FCC*, No. 84-1176 (D.C. Cir.). The Commission unanimously concluded, based on recent Supreme Court decisions applying equal protection analysis, that racial classifications may not be based on the assumption alone, without a factual predicate, that integrated minority owners will result in increased programming and viewpoint diversity. *Id.* As a result the Commission urged the court to permit us to undertake a comprehensive inquiry into the legal and factual predicate of our preference policies to determine whether a nexus truly does exist between minority ownership and program diversity. The Commission thereafter undertook such a study designed to provide a fuller record and to gather the empirical data necessary to support retention of our preference scheme. *Notice of Inquiry* in MM Docket No. 86-784, FCC 86-549, 1 FCC Rcd. 1315 (1986). Prior to the completion of this study, however, Congress decreed that the FCC expend no funds in fiscal year 1988 to complete its research or to change its preference policies.[2] In compliance with this congressional mandate, the Commission

[2] *See Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-202 (signed Dec. 22, 1987). The appropriations legislation prohibits the Commission from using funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the Commission's policies premised on racial, ethnic or gender classification, except to: (1) close its proceeding investigating the preference policies; (2) reinstate prior policy; and (3) lift any suspension imposed on implementing the policies pending its investigation.

closed its rulemaking, without issuing any findings or conclusions, and reestablished all preference policies.

Two cases before the D.C. Circuit were thus made ripe for decision. First, in *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. March 31, 1989), the court was asked to rule on the constitutionality of the distress sale policy. Second, in *Winter Park Communications Inc., v. FCC*, No. 85-1755 (D.C. Cir. April 21, 1989), it was presented with the same question regarding minority preferences in the comparative hearing process. In both cases, the panels dealt with the continuing validity of *West Michigan*, in which the court had found the Commission's minority preference policy consistent with the Supreme Court's holdings in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

In *Shurberg*, each of the three separate opinions treats *West Michigan* differently. Judge Silberman questions *West Michigan*'s initial conclusion that there is a compelling government interest in increasing diversity of programming and goes on to conclude that it may, in any event, be undermined by the Supreme Court's recent decision in *Croson*. Judge MacKinnon's opinion does not address *West Michigan per se* but insists that preference policies must be narrowly tailored, while Judge Wald concludes that at least some of the conclusions in *West Michigan* have *not* been undermined by subsequent Supreme Court decisions.

In *Winter Park*, Judge Edwards finds the comparative preference policy to be constitutional under *West Michigan*, while Judge Williams, in a dissent, argues persuasively [4 FCC Rcd 4512] that *West Michigan* has been largely undermined by *Wygant* and *Croson*. Thus, we have five different opinions on the continuing validity of *West Michigan* and the constitutional standards to be applied to minority preference policies. To further trouble an already complex issue, the two panels have also given a range of opinions

on the weight and meaning to be given to the Congressional appropriations limits regarding our preference policies.

In light of the importance and complexity of these issues, particularly given recent Congressional actions and the varying opinions in *Shurberg* and *Winter Park*, I would petition the D.C. Circuit to hear *Shurberg en banc* and support a petition for rehearing on *Winter Park*. Both cases could be considered together and the court could give us definitive guidance. But I cannot support my fellow Commissioners' approach of requesting only partial enlightenment in this area.

Nor can I agree with the substantive arguments they make. Recent Supreme Court precedents collectively make clear that racial and gender classifications are inherently suspect and will be subject to close and careful scrutiny.[3] Most significantly, after *Croson*, the standard of review required for *any* governmental classification based on race is strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132, 4139 (Part III-A) and 4146 (Scalia, J. concurring).

The first stage of equal protection analysis under strict scrutiny requires a determination as to whether there is a compelling government objective. The Supreme Court has only identified two compelling interests for race-based policies. First, such minority preference policies may be implemented to remedy past discrimination. *Fullilove*, 448 U.S. at 475.[4] Second, at least Justice Powell in *Bakke*

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[3] *See e.g., City of Richmond v. J.A. Croson Co.*, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989); *Wygant v. Jackson Board of Education*, 90 L. Ed. 2d 260 (1986); *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See also Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

[4] The Commission has never claimed that its preference policies are intended to remedy prior discrimination against minorities or to provide remedial benefits. It could be argued that Congress has separately adopted our policies as its own, with the justification that its policies are remedial. But Congress did not justify its funding decision as remedial. As my fellow Commissioners agree, Congress relied solely on a diversity rationale. FCC Petition for Rehearing at n.1.

believed that, for educational institutions, academic diversity is a compelling government interest.[5] *Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.).

From this second justification, the D.C. Circuit in *West Michigan* extrapolated to find "program diversity" in broadcasting a compelling interest. This premise, set out in *West Michigan*, relies on Justice Powell's opinion in *Bakke* that a diverse educational environment is a compelling goal that may be constitutionally promoted by certain admissions policies which recognize race as one of several factors. As racial diversity is only one aspect of a truly diverse student body, Justice Powell believed that a university could use race as one factor in a multi-factor admissions decision.[6]

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[5] It is unclear after *Croson* whether Justice Powell's diversity rationale would be endorsed by the present Court. A plurality of the Court in that case quite clearly stated that classifications based on race should be "strictly reserved for remedial settings." *Croson*, 57 U.S.L.W. at 4139, *see also id.* at 4146 (Scalia, J., concurring). And Justice O'Connor, who had indicated some sympathy for Justice Powell's diversity rationale, *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring), appears to have rejected that rationale in *Croson*. Justice Stevens interpreted Justice O'Connor's opinion as such a rejection, *Croson*, 57 U.S.L.W. at 4144 n.1 (Stevens, J., concurring in part), as has Judge Silberman, *Shurberg*, Silberman opin. at 35-39. While Judge Wald agrees as to the substance of Justice Stevens' interpretation of the O'Connor opinion, *Shurberg*, Wald opin. at 18 n.20 (dissenting), she herself would read that same opinion differently. With all due respect to Judge Wald, I must defer to the interpretation of *Croson* rendered by a member of the Supreme Court. Thus, in light of the Court's decision in *Croson*, whether the academic diversity rationale remains as a compelling government interest for race-based policies is an open question. Certainly then, extensions of that rationale cannot be supported.

[6] The plan before the *Bakke* court, however, employed a racial set-aside, which did not account for other diversity factors. As Justice Powell wrote in *Bakke*, "preferring members of any one group for no

Similarly, if one assumes program diversity to be a compelling goal, race is but one factor which may bear on diversity of viewpoint.[7] Because minority status is the exclusive criterion for use of the distress sale policy, I fail to see why that policy passes even Justice Powell's test. Outside the remedial context, the Supreme Court has *never* upheld a preference policy based solely on race, and has specifically rejected the use of minority set-asides as a means of promoting diversity. *Bakke*, 438 U.S. at 314-18.

Citing *Fullilove*, my fellow Commissioners see no reason why the court should not extend its findings in the remedial context to the diversity arena. I submit that one does not necessarily lead to the other. It is clear after the Supreme Court's decision in *Croson* that race-based measures are subject to the highest degree of scrutiny. Where evidence of past discrimination exists, the Court may well tolerate race-based *remedial* measures. But where the more nebulous goal of diversity is at issue, the most that even Justice Powell would permit is the consideration of race as one of several factors. There is no basis to think the Court would allow more.

Ensuring that minority perspectives can be aired in a diverse broadcast marketplace is an important policy goal which I support. But our station licensing and transfer policies must, above all else, guarantee equal protection of the laws to all Americans. As such, our race-conscious policies must be subjected to the most rigorous review to insure fidelity to this principle.

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reason other than race or ethic origin is discrimination for its own sake. This the Constitution forbids.'" *Bakke*, 438 U.S. at 307. The Court thus struck that plan down as unconstitutional.

[7] As I have previously noted, however, the Commission has been prohibited from determining whether race is a factor in viewpoint diversity, that is, whether there is a nexus between minority ownership and programming.

In this case, my fellow Commissioners have chosen to appeal a decision with which they disagree (*Shurberg*) and let stand a second decision with which they feel more comfortable (*Winter Park*) despite hopeless confusion and conflict in the relevant case law. The principle of "equal protection" deserves better.

May 15, 1989

[4 FCC Rcd 4514]
PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

FCC 89-158
2858

News media information 202/832-5050.
Recorded listing of releases and texts 202/832-0002

May 15, 1989

COMMISSION DECLINES TO SUPPORT REHEARING *EN BANC* IN *WINTER PARK v. FCC*

On April 21, 1989, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the constitutionality of awarding minority preferences in the comparative hearing process, in *Winter Park Communication, [sic] Inc. v. FCC.*

The Commission has voted 2-1, with Chairman Patrick dissenting, not to support rehearing *en banc.*

Action by the Commission May 15, 1989, by Public Notice (FCC 89-158). Commissioners Quello and Dennis, with Chairman Patrick dissenting and issuing a statement and Commissioner Dennis issuing a statement.

[4 FCC Rcd 4514]
Dissenting Statement
of
Chairman Dennis R. Patrick

For the reasons stated in my dissent to the petition for rehearing in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, No. 84-1600 (D.C. Cir., decided Mar. 31, 1989), I respectfully dissent to my fellow Commissioners' refusal to support rehearing in *Winter Park Communications, Inc.* v. *FCC*, No. 85-1755 (D.C. Cir., decided Apr. 21, 1989).

[4 FCC Rcd 4514]
Separate Statement
of
Commissioner Patricia Diaz Dennis

Re: *Winter Park Communications, Inc. v. FCC*

Frankly, I am puzzled that the Commission is issuing a press release announcing that we will not appeal a case we won. In light of Congress's specific appropriations language directing us to retain our minority ownership policies,[1] and our long-standing practice of presuming the constitutionality of policies mandated by Congress,[2] I would have expected the decision not to appeal to be by an automatic, 3-0 vote.

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[1] Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

[2] *See, e.g., Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464*, 4 FCC Rcd 457 (1988).

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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ROBERT L. PETTIT
General Counsel

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Associate General Counsel

C. GREY PASH, JR.
Counsel
Federal Communications Commission
Washington, D.C. 20544

20 pp

QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings violates the equal protection component of the Fifth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 873 F.2d 347; the orders filed on the denial of the petition for rehearing and suggestion of rehearing en banc (Pet. App. 96a-97a, 98a-99a) are unreported. The memorandum opinion and order of the Federal Communications Commission granting the license application to petitioner's competitor (Pet. App. 60a-63a) is unreported. The memorandum opinions and orders of the Federal Communications Commission on remand from the court of appeals (Pet. App. 48a-51a, 52a-57a) are reported at 3 F.C.C. Rcd 866 and 2 F.C.C. Rcd 1474, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989. A petition for rehearing was denied on June 21, 1989. Pet. App. 96a-97a. The petition for a writ of certiorari was filed on September 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Background

1. *Comparative Licensing Proceedings*

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission the exclusive authority to grant licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. In comparative proceedings, the Act calls for the FCC to make television and radio licensing decisions in accord with the "public convenience, interest, or necessity." 47 U.S.C. 303. The Commission, under that statutory mandate, has long identified two interrelated objectives for selecting qualified applicants: the "best practicable service to the public" and a "maximum diffusion of control of the media of mass communications," commonly referred to as diversification, in order to maximize diversity of programming. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [hereinafter *1965 Policy Statement*]; see also *Cleveland Television Corp.* v. *FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984).

In comparative licensing proceedings, the FCC weighs both "quantitative" and "qualitative" attributes of competing applicants.[1] Pet. App. 4a. The quantitative assessment generally rests on each applicant's proportional integration of ownership into management ("best practicable service") and each applicant's other media holdings ("diversification"). The FCC has made clear that participation in station management by owners is a factor of "substantial importance" in determining which applicant is superior under the best practicable service objective. *1965 Policy Statement*, 1 F.C.C.2d at 395.[2] If one applicant has a clear quantitative advantage, then that applicant will receive the license if he is otherwise qualified. See generally Pet. App. 4a; *WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 819 (Rev. Bd. 1982), review denied, FCC No. 83-368 (Sept. 15, 1983), aff'd in part and rev'd in part on other grounds, 753 F.2d 1132 (D.C. Cir. 1985); *1965 Policy Statement*, 1 F.C.C.2d at 395.

If there are no appreciable quantitative differences among the applicants, the FCC then assesses each applicant's relative strengths on a variety of "qualitative" factors, which include local residence, participation in civic activities, past broadcast experience, and race and gender of the owner. See Pet. App. 4a; *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 941 & n.2 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); WPIX, Inc., 68 F.C.C.2d 381, 411-412 (1978); *1965 Policy Statement*, 1 F.C.C.2d at 395-396. Such qualitative enhancements, however, may not over-

[1] As a threshold matter, the FCC determines whether any applicant merits a preference for providing first or second local service to a community. See 47 U.S.C. 307(b). If one applicant receives a Section 307(b) preference, then that applicant generally will prevail without a comparative hearing. See *WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132, 1135 (D.C. Cir. 1985).

[2] Other factors, such as proposed program service, past broadcast record, and efficient use of the frequency, may also play a role in determining which applicant will provide the best practicable service. *1965 Policy Statement*, 1 F.C.C.2d at 397-399.

come clear quantitative differences among applicants. See *WHW Enterprises, Inc.*, 89 F.C.C.2d at 817.

2. *Development of the FCC's Minority Ownership Policies*

As originally conceived and implemented under the *1965 Policy Statement*, the FCC's selection criteria for comparative licensing proceedings were race-neutral.[3] In 1973, however, the District of Columbia Circuit concluded that there was a dearth of minorities in broadcasting and that promoting greater minority ownership in the broadcasting industry would foster program diversity. The court of appeals therefore directed the Commission to give some "favorable consideration" to an applicant who proposes to include racial minorities among its owners who will participate in managing the station. *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); see *id.* at 935-938; *id.* at 941-942 (supplemental opinion of Fahy, J.).[4] Accord *Garrett* v. *FCC*, 513 F.2d 1056, 1062-1063 (D.C. Cir. 1975).[5]

[3] During the late 1960s, the FCC had addressed the problem of racial discrimination in licensees' employment practices. See generally *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).

[4] The court of appeals stated that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

495 F.2d at 938 (footnotes omitted).

[5] The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

As a result of the *TV 9* and *Garrett* decisions, together with its own studies, see, *e.g.*, *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-981 (1978) [hereinafter *1978 Policy Statement*]; Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [hereinafter *Task Force Report*], the FCC implemented a policy of awarding preferences in comparative proceedings for minority ownership. See *WPIX, Inc.*, 68 F.C.C.2d at 411-412; see also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 & n.13 (1982), aff'd *sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985). The *Task Force Report* recounted that "[d]espite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country." *Task Force Report* at 1 (emphasis in original). The Task Force viewed that "[a]cute underrepresentation of minorities among the owners of broadcast properties [as] troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience," *ibid.*, and found that "[u]nless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities," *ibid.*

The FCC credited these findings and, in calling for the awarding of minority enhancement credits in comparative licensing proceedings to remedy the "[a]cute underrepre-

sentation" of minorities in broadcasting, announced its commitment to the view that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming * * *, [and that] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum." *1978 Policy Statement*, 68 F.C.C.2d at 981. The Commission explained that because of

> the continuing underrepresentation of minorities in broadcast ownership, and because minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, [the Commission concluded that] full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.

Waters Broadcasting Corp., 91 F.C.C.2d at 1264, 1265.[6]

[6] These findings also undergird other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase minority participation in broadcasting by awarding tax certificates, *i.e.*, incentives, to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; *1978 Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the random assignment of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, in 1978, the FCC adopted its "distress sale" program by which the Commission permits licensees, under certain circumstances, to sell stations to minority-controlled buyers at below market prices rather than risk revocation or denial of renewal of the license. *1978 Policy Statement*, 68 F.C.C.2d at 983. The District of Columbia Circuit recently struck down the FCC's minority distress sale program as unconstitutional. *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (D.C. Cir. 1989) (per curiam), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700. In a separate submission filed this date, the FCC has opposed the petition for a writ of certiorari filed by the unsuccessful license applicant in that case. We have provided a copy of that brief to counsel for petitioner in this case.

As applied in initial comparative licensing proceedings, minority ownership and participation in management is a "plus-factor [to be] weighed along with all other relevant factors in determining which applicant is to be awarded a preference" under the integration criterion. *TV 9, Inc.* v. *FCC*, 495 F.2d at 941 n.2.; see *WPIX, Inc.*, 68 F.C.C.2d at 411. The FCC awards credits to the extent that an individual minority owner will actively participate in the management of the station. See *TV 9, Inc.* v. *FCC*, 495 F.2d at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-412.

3. *Congressional Oversight of the FCC's Minority Ownership Policies*

In 1982, Congress amended the Communications Act of 1934 to authorize the FCC to award licenses under a random selection system, and directed the FCC, in creating any such lottery procedure, to grant "an additional significant preference * * * to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A); see note 6, *supra*. Congress was aware that minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 44 (1982). Consequently, Congress was of the view that

> [o]ne means of remedying the past economic disadvantage to minorities which has limited their entry

> into * * * the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media * * *, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings * * *.

Ibid.; see also H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

In 1987, in response to the FCC's initiation of inquiry proceedings to reconsider the appropriateness of its policies that seek to promote minority ownership in broadcasting, see pp. 12-13, *infra*, Congress enacted an appropriations provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a re-examination of" those policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-32. The Senate Appropriations Committee, the author of that prohibition, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority * * * audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Congress has since extended the prohibition through fiscal year 1989, see Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, Tit. V, 102 Stat. 2216-2217 (1988), and has recently renewed that extension for the current fiscal year, 1990, see Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).[7]

[7] On November 21, 1989, the President signed the appropriations provision into law. See also H.R. Conf. Rep. No. 299, 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

In recent years, Congress has continued to oversee the FCC's minority ownership programs. See, *e.g.*, *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983). Following the decision in this case, Congress again held hearings to examine the current status of those programs. The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989, to examine further the issue of minority ownership of broadcast stations. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

B. Proceedings in the Present Case

1. *The FCC's Initial Comparative Licensing Proceeding*

a. In 1982, following a rulemaking proceeding, the FCC assigned a new UHF television channel to Orlando, Florida. See *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (New Smyrna Beach, Orlando, and Winter Park, Florida)*, 50 Rad. Reg. 2d (P & F) 1714 (1982). In 1983, petitioner Metro Broadcasting, Inc., a Florida corporation owned by nine men, four of whom are local residents and one of whom is black, Rainbow Broadcasting Company, a general partnership consisting of two women and one man, all of whom are hispanic, and Winter Park Communications, Inc., each filed competing applications with the FCC to build and operate that television station. The Commission

assigned the matter to an administrative law judge. Pet. App. 2a-4a, 81a-88a.

The ALJ granted petitioner Metro Broadcasting's application. *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073 (1983).[8] The ALJ found that petitioner deserved "a substantial comparative coverage preference over Winter Park," and that neither applicant merited a comparative preference for "diversification of mass media." *Id.* at 1088. Lastly, with respect to "integration of ownership," the ALJ found that petitioner was "entitled to full-time quantitative integration of 99%, while Winter Park is entitled to only a part-time 10%." *Ibid.*[9] The ALJ thus concluded that "on integration of ownership with management [petitioner] proves the clear and decisive winner [and that petitioner] is an overwhelming comparative winner over Winter Park." *Ibid.*

b. The FCC's Review Board reversed the ALJ's grant to petitioner and awarded the permit to Rainbow. Pet. App. 64a-93a; see *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (1984). The Board concluded, contrary to the ALJ's findings, that Rainbow was a qualified applicant, and thus proceeded to consider all three applicants' comparative credits. The Board gave petitioner a "79.2% full-time plus [a] 19.8% part-time quantitative integration credit" and awarded Rainbow a "90% full-time credit." Pet. App.

[8] The ALJ disqualified Rainbow for "misrepresent[ing] decisionally significant facts in [its] integration proposal." 96 F.C.C.2d at 1087. The ALJ also determined that neither petitioner nor Winter Park was entitled to a "decisionally significant" Section 307(b) preference. 96 F.C.C.2d at 1088; see note 1, *supra*.

[9] The ALJ also pointed out that several factors "strengthened" petitioner's quantitative assessment: several of petitioner's principals were local residents active in Orlando civic activities; one principal had broadcast experience; and a minority principal held roughly 20% of the firm's stock. 96 F.C.C.2d at 1088.

86a. The Board gave Winter Park only a 10% part-time credit, and thus chose not to consider Winter Park's enhancement credit. *Id.* at 86a-87a.

The Board determined that Rainbow was not only quantitatively ahead of petitioner (10.8% advantage), but also qualitatively superior because Rainbow was entitled to "a substantial preference for minority participation by 90% of its stock ownership * * * in contrast with [petitioner's] 19.8% credit [for minority participation]." Pet. App. 87a. The Board also gave Rainbow "a solid broadcast preference" because one of its principals' past broadcast experience was "much more significant" than that of petitioner's owners. *Ibid.* The Board concluded that

> although the qualitative comparison between Rainbow and [petitioner] is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs [petitioner's] local residence and civic participation advantage.

Id. at 88a.

c. In October 1985, the FCC denied both petitioner's and Winter Park's applications to review the Board's decision. Pet. App. 60a-63a. As a result, the Board's ruling became the FCC's final administrative decision under 47 U.S.C. 155(c)(3). Petitioner and Winter Park filed timely appeals from the Commission's decision to the District of Columbia Circuit.

2. *Initial Proceedings in the Court of Appeals and Administrative Proceedings on Remand*

a. The disposition of the appeals was delayed for several years because of events concerning related proceedings. In August 1985, the court of appeals held that the FCC had exceeded its statutory authority by adopting

a female preference in comparative licensing proceedings. *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). On October 31, 1985, however, after the appeals in this case had been filed, the court of appeals, sitting en banc, granted a private party's petition for rehearing in the *Steele* case, vacated the panel's opinion, and, on November 22, ordered the parties to file supplemental briefs on the pertinent statutory and constitutional issues. In September 1986, the FCC filed a supplemental brief in the *Steele* case, stating that "the Commission believes that both [its] gender and racial preference schemes conflict with equal protection standards under the Constitution." Brief for FCC on Rehearing En Banc at 14, *Steele* v. *FCC, supra*. In light of its position, the FCC asked the court of appeals to remand the case to the Commission for further proceedings to explore the underpinnings of its policies. See Appendix to Brief for FCC on Rehearing En Banc, *Steele* v. *FCC, supra*.

On October 9, 1986, the court of appeals granted the FCC's motion for remand in the *Steele* case. And in December 1986, the Commission initiated a separate non-adjudicatory inquiry proceeding to consider the validity of its female and minority ownership policies. See *Re-examination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986) (MM Dkt. No. 86-484), modified, 2 F.C.C. Rcd 2377 (1987). The Commission explained that, in light of recent developments in the law, it needed to reconsider both the factual and legal bases for the ownership policies. See 1 F.C.C. Rcd at 1317-1318.

b. As a result of the remand in the *Steele* case, together with the related developments, the FCC, joined in a separate motion by petitioner, asked the court of appeals to remand the record in the instant case in order for the

Commission to determine "whether the minority preference is of decisional significance in this proceeding." FCC C.A. Mot. for Remand 3. The court of appeals granted that motion in November 1986, and remanded the case to the FCC. Pet. App. 58a-59a.

On remand, the FCC concluded that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to [petitioner]." Pet. App. 57a; see *Metro Broadcasting, Inc.*, 2 F.C.C. Rcd 1474, 1475 (1987) (MM Dkt. Nos. 83-140, 83-142, 83-143). The FCC therefore held the case in abeyance pending the outcome of its inquiry proceeding re-examining its minority ownership policies.

c. On December 22, 1987, the President signed into law the Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, which, among other things, appropriated funds for FCC salaries and expenses for that fiscal year. That law provided that

> none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the [FCC] with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended * * *, which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

101 Stat. 1329-31.

The FCC complied with that legislation and on January 14, 1988, closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative licensing proceedings, and of preferring minority-controlled applicants in distress sales. See, *e.g.*, *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988).

d. In February 1988, the FCC reaffirmed its earlier decision in this case awarding the permit to Rainbow and denying petitioner's competing application. Pet. App. 48a-51a; see *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

On June 1988, by agreement of the parties, the court of appeals recalled the mandate and record of this case, and scheduled the case for oral argument in November. Pet. App. 6a.[10]

3. The Court of Appeals decision

A divided court of appeals affirmed. Pet. App. 1a-46a.[11] The court first determined that the constitutionality of the FCC's minority ownership policy was

[10] The FCC filed a supplemental brief defending, on both statutory and constitutional grounds, its policy of awarding merit to minority owners in comparative licensing proceedings. See Supp. C.A. Brief for FCC 28-47.

The United States, as amicus curiae, filed a brief contending that the FCC's "racial preference in its comparative process is unconstitutional." Gov't C.A. Br. 9. In light of this Court's then-pending decision in *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), however, the United States urged the court of appeals to defer its decision until the Court had resolved that case. Gov't C.A. Br. 10, 34-35.

[11] The court of appeals unanimously rejected Winter Park's claim that the FCC erred in refusing to award a dispositive Section 307(b) preference. Pet. App. 6a-10a; *id.* at 18a (Williams, J., dissenting on other grounds). That issue is not presented for this Court's review.

properly at issue because "the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive." *Id.* at 10a.[12] The court then concluded that *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), squarely controls, and thus the FCC's policy " 'easily passes constitutional muster.' " Pet. App. 10a (quoting *West Michigan*, 735 F.2d at 613).

In *West Michigan*, the court of appeals had upheld the FCC's policy for two principal reasons: first, the policy was not a rigid quota system, but rather "a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters" (735 F.2d at 613); and second, in amending 47 U.S.C. 309(i) in 1982 to authorize the FCC to award minority preferences in lotteries, Congress recognized that the underrepresentation of minorities in broadcasting stemmed from racial discrimination, and thus "must be understood to have viewed the sort of enhancement used here as a valid remedial measure." 735 F.2d at 613-614.

The court concluded that *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not undermine the validity of *West Michigan* or call the FCC's minority ownership policy into question. *West Michigan* relied on *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978),

[12] The court of appeals declined to address the validity of the FCC's gender preference policy, because the FCC had "determined * * * that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation." Pet. App. 10a n. 5 (citing 3 F.C.C. Rcd at 876 n.1 (Pet. App. 49a n.1)). For that reason, petitioner errs in claiming (Pet. 11, 15-16, 21-22, 25-28) that this case presents an occasion for the Court to review the FCC's use of gender enhancements in comparative licensing proceedings.

neither of which was repudiated in *Croson*. Pet. App. 12a-13a. The court stated that Justice O'Connor's opinion for the Court in *Croson* "relied heavily on the reasoning of *Fullilove* and was careful to point out why the facts of [*Croson*] compelled a different result." *Id.* at 13a. Furthermore, the court found that "none of the opinions in [*Croson*] expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination." *Ibid.*

Finally, the court found that *Croson* "stressed two crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in [*Croson*], and [concluded] in both respects [that] the FCC's policy is more similar to the *Fullilove* program found constitutional than to the [*Croson*] plan." Pet. App. 13a. First, the FCC's policy, like the program at issue in *Fullilove*, was flexible; the policy did "not involve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." *Id.* at 13a-14a. Second, "[l]ike the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval." *Id.* at 14a.

Judge Williams dissented from the court's constitutional holding. Pet. App. 18a-46a. He concluded that this Court's recent decisions in *Croson* and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), "largely undermined" the validity of *West Michigan* and thus the constitutionality of the FCC's minority ownership policy as well. Pet. App. 18a. In his view, the FCC's asserted rationale for its policy—promoting diversity in programming—cannot survive *Croson*. See *id.* at 18a, 19a-30a. And, since the alternative justification—remedying prior discrimination, as allegedly mandated by Congress—was asserted only by

Rainbow, and not by the FCC, and may not even meet constitutional standards as articulated in *Wygant* and *Croson*, see *id.* at 30a-45a, Judge Williams believed that "the case should be remanded to the Commission for it to interpret Congress's directions." *Id.* at 19a.

On June 21, 1989, petitions for rehearing, together with suggestions of rehearing en banc, filed by both Winter Park and petitioner, were denied. Pet. App. 96a-97a, 98a-99a. Judges Silberman, Williams, D.H. Ginsburg, and Sentelle dissented from the denial of rehearing en banc. *Id.* at 98a-99a.

ARGUMENT

This Court is well aware that government-sponsored racial preference programs, like the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings, may involve important and sensitive questions of public policy and constitutional law. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265 (1978). Several considerations, however, suggest that further review of this particular case is not warranted at this time. Accordingly, we submit that review should be denied.

First, as petitioner correctly observes, this case is in many respects one of "first impression." Pet. 11. The decision below, apart from a different panel's decision in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (1989), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700, is the first court of appeals

decision to apply this Court's analytical framework in *City of Richmond* v. *J.A. Croson Co., supra,* to a government-sponsored program involving a racial preference. Cf. *United States* v. *City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). Thus, to the extent petitioner seeks this Court's review of the court of appeals' treatment of that decision as applied to a particular factual setting, see, *e.g.*, Pet. 14-19, 23-27, that request may well be premature pending further illumination in the courts of appeals.

Second, petitioner points out (Pet. 25-27) that the court of appeals' decision, together with the District of Columbia Circuit's earlier decision in *West Michigan Broadcasting Co.* v. *FCC,* 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1985), may not be squared with *Shurberg Broadcasting of Hartford, Inc.* v. *FCC,* 876 F.2d 902 (1989), petition for cert. pending *sub nom. Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, No. 89-700, decided by a different panel of the court of appeals. See note 6, *supra.* These cases pose no direct conflict, as each involved a distinct minority ownership program.[13] Nevertheless, they do rely on conflicting rationales and applications of this Court's decisions. In *Shurberg,* a divided court of appeals held that the FCC's minority distress sale policy, which permits a limited category of licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment. And in so holding, the *Shurberg* court flatly rejected the analyses used by both the majority

[13] Under the FCC's policy of awarding a qualitative enhancement for minority ownership in comparative licensing proceedings, the policy at issue in this case and *West Michigan,* the Commission takes minority status into account as one factor in a multi-factor comparative process. By contrast, under the FCC's minority distress sale policy, the policy at issue in *Shurberg,* the Commission permits a limited category of licenses to be transferred only to minority-controlled firms.

below and the *West Michigan* court to uphold the FCC's minority ownership policy in comparative licensing. See *Shurberg,* 876 F.2d at 902-903 (per curiam); *id.* at 910-926 (Silberman, J.); *id.* at 928-934 (MacKinnon, J., concurring in judgment).

That intra-circuit conflict does not call for further review by this Court. The Court has long followed the prudential practice of not stepping in to resolve such disputes. *E.g., Davis* v. *United States,* 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957). And the current status of the District of Columbia Circuit suggests that a departure from this Court's practice is especially unwarranted in this case. That circuit currently has three judgeships vacant; those vacancies are expected to be filled in the foreseeable future. Accordingly, once the court of appeals has its allotted complement of judges, and if issues surrounding the FCC's racial ownership policies persist, the entire court of appeals will be able to resolve any inconsistencies among panel decisions.[14]

Finally, as is apparent from the background of this case, see, *e.g.*, pp. 7-8, *supra,* both the FCC and the Congress have paid particular attention to and have closely monitored developments in this evolving area of law and public policy. The current state of affairs, which mandates the FCC's continued use of racial preference policies (subject,

[14] The particular Commission programs at issue in the conflicting panel decisions, moreover, affect only limited categories of licensing decisions—those generally involving applications for new stations on previously unoccupied frequencies or situations where the Commission finds it necessary to order a hearing on an existing licensee's qualifications to continue to broadcast. In addition, the peculiar regulatory background against which these programs were adopted, and the particular features of the programs involved, suggest that the panel decisions may well be of limited precedential significance for other sectors of the economy.

of course, to judicial review), stems from Congress's re-enactment of the annual appropriations provision. See p. 8 & note 7, *supra*. Accordingly, as the law now stands, Congress must reconsider the subject matter by the close of fiscal year 1990, and in fact has recently held hearings to examine the status and soundness of the FCC's minority ownership policies. See *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished); see also note 7, *supra*. In these circumstances, where Congress is revisiting this complex and sensitive area of the law, intervention by this Court at this time is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT RAINBOW BROADCASTING COMPANY IN OPPOSITION

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No. 89-453

METRO BROADCASTING, INC.,
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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT RAINBOW BROADCASTING COMPANY IN OPPOSITION

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Commission's congressionally mandated consideration of broadcast applicants' minority status as one enhancing factor in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

COUNTERSTATEMENT OF THE CASE

This proceeding involves the comparative qualifications of the petitioner, Metro Broadcasting, Inc. and respondent Rainbow Broadcasting Company to be the licensee of a UHF television station allocated by the Commission to Orlando, Florida in 1982, *Amendment of § 73.606(b), Table of Assignments*, 50 Rad. Reg.2d (P&F) 1714 (1982).[1] Under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) (hereafter *Policy Statement*), such comparisons seek to attain two general policy objectives: "the best practicable service to the public" and "maximum diffusion of control of the media of mass communications" ("diversification"). These separate objectives are united by their common service to the overarching First Amendment derived public interest principle that the broadcast audience is best served by "'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.*, at 394 n.4 (quoting from *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); see *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

The diversification criterion "serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, at 780. It "constitutes a primary objective in the licensing scheme", *Policy Statement, supra*, 1 F.C.C.2d at 394, and "an applicant having no... media interests will all but certainly prevail over a party with such media interests", *Newton Television Ltd.*, 3 F.C.C. Rcd. 553 (Rev. Bd. 1988), *modified on other grounds*, 4 F.C.C. Rcd. 2561 (1989).

The best practicable service criterion involves several factors. Only one, participation of owners in day to day station management ("integration"), *Policy Statement, supra*, 1 F.C.C.2d 393, 395-96, differentiates these two applicants.[2] The integration criterion requires a two part assessment of competing proposals: "quantitative" and "qualitative". The quantitative assessment compares the percentage of the applicants' ownership represented in active day to day station management and a "clear" superiority on this factor is dispositive without more. *See, e.g., WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 819 (Rev. Bd. 1982), *review denied*, FCC 83-368 (Sept. 15, 1983), *affirmed in part and reversed in part on other grounds*, 753 F.2d 1132 (D.C. Cir. 1985). In the absence of such a dispositive quantitative distinction, qualitative factors enhancing the quantitative integration proposals become the tie breaker.

[1] The case originally involved a third applicant, Winter Park Broadcasting, Inc., which sought a dispositive preference for its proposal to provide a first local service to the contiguous suburb of Winter Park. That applicant, which ranked third comparatively (Pet. App. 86a-87a), was effectively excluded by affirmance (Pet. App. 6a-10a) of the Commission's judgment that all parts of an urbanized area are one community for television licensing purposes.

[2] Other components of the best practicable service criterion include proposed program service, where there are "material and substantial differences" between proposals, *Policy Statement, supra*, 1 F.C.C.2d 393, 397-98; an unusually good or bad past broadcast record, *id.*, at 399; efficient use of frequency from an engineering standpoint, *id.*, at 398-99; and facts establishing relevant defects in applicant character, *id.*, at 399, a matter now separately considered and only when potentially disqualifying, *Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986).

Neither applicant in this case has any other media holding (Pet. App. 80a); neither past nor proposed programing is in issue; the engineering proposals are substantially the same (Pet. App. 81a); and while the Administrative Law Judge disqualified Rainbow for lack of candour in a prehearing filing, he was reversed by the Review Board (Pet. App. 66a-76a) and the matter was not appealed.

The *Policy Statement, supra*, 1 F.C.C.2d 393, 395-96, identified three such factors: local residence, past or prospective; local civic activities; and broadcast experience. It also noted that this listing did not "preclude the full examination of any relevant and substantial factor", *id.*, at 399, and anticipated changes both in emphasis and in policy when future circumstances dictated, *id.*, at 393. Addition of the minority enhancement here in issue was one such change. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (hereafter "*Minority Policy Statement*"). The enhancement, upheld against equal protection challenge in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 613-16 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), was adopted in response to congressional, judicial and agency concern with encouragement of minority broadcast ownership. *Id.*, at 607 (and citations therein). It has been a factor for over a decade in all relevant cases not determined by diversification or quantitative integration differences alone. A similar enhancement for female ownership and participation was subsequently adopted. *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

In this case, the Review Board found that Rainbow's quantitative integration advantage was "probably a 'clear' enough difference" to be outcome determinative (Pet. App. 87a). It nonetheless also compared the applicants' qualitative attributes. Rainbow was again preferred, on the basis of greater "minority participation", "more significant" past broadcast experience "attach[ing] to larger ownership", and a "very slight" advantage in female participation, advantages found to outweigh Metro's stronger showings on local residence and civic activities. (Pet. App. 87a-88a).

The Commission, "agree[ing] with the Board's resolution of this case" (Pet. App. 61a), denied review (Pet.

App. 60a-63a), noting that the result would be unchanged by deletion of Rainbow's female enhancement (Pet. App. 61a). The case was appealed and briefed on substantial evidence grounds. Prior to argument, however, the Commission successfully sought remand (Pet. App. 58a-59a); issued a *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986)(MM Docket No. 86-484); and ordered the case held in abeyance pending the outcome of that proceeding (Pet. App. 52a-57a). The Inquiry was cut short by House Joint Resolution 395, Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes, Public Law No. 100-202, 101 Stat. 1329 (1987) (hereafter "Continuing Resolution"), which in pertinent part provided:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a re-examination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry....

In compliance with the legislative mandate, the Commission reactivated this proceeding and reaffirmed its order upholding the Review Board's grant of Rainbow's application. (Pet. App. 48a-51a). The case was rebriefed, this time including Metro's equal protection challenge to the minority and female enhancements. The court specif-

ically declined to rule on the propriety of the female enhancement, given the Commission's ruling that it did not affect the outcome of the case. (Pet. App. 10a n.5). The minority enhancement, however, was considered and upheld. (Pet. App. 10a-15a). The court reasoned that its earlier decision in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), "disposed of the constitutional challenges to the use of enhancements for minority ownership, and we are bound to follow this law of the circuit" (Pet. App. 15a), since none of the "several challenges to race and gender preferences in employment" decided by this Court since the circuit court's opinion in *West Michigan* "has undermined the holding" in that case (Pet. App. 11a-12a).

ARGUMENT

The petition presents no issue warranting review by this Court; it simply seeks reexamination of a settled question of congressional power.

1. The minority enhancement policy[3] withstood equal protection challenge in *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 613-16 (D.C. Cir.), *cert. denied*, 419 U.S. 986 (1984), in light of this Court's decisions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), defining the parameters of federal remedial authority. The petition's theory that the reasoning of *West Michigan*, found controlling below, can no longer support the policy, is premised upon subsequent

[3] While the petition also challenges the female enhancement policy, the court below specifically declined to rule on that matter (Pet. App. 10a n.5) and it is accordingly without premise in the record.

decisions of this Court in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), defining the parameters of state and municipal remedial authority.

The constraints relevant to state action have no bearing on the Commission's public interest mandate, which this "Court has characterized . . . as 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy,'" *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (quoting from *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940)). Moreover, the Congress has taken direct action since the *West Michigan* ruling to render this policy specifically and affirmatively its own, by adoption of the Continuing Resolution, *supra*, mandating reinstatement of prior policy. The Commission described its own action in reinstating that policy and reaffirming the Review Board's judgment in this case as an effort "to comply with the legislation" (Pet. App. 51a). Accordingly, even were the permissible scope of agency authority in this area narrower than that of the Congress which delegated such authority, the propriety of the direct congressional action at issue here would follow, *a fortiori*, from the determination in *West Michigan* that the same action was proper when taken by the Commission.

2. As the court below found (Pet. App. 11a-12a), *West Michigan* itself remains fully consistent with the cases upon which it relied and is unaffected by those which followed. Employment of racial criteria in congressional enactments is constitutionally permissible when 1), the legislative "*objectives* . . . are within the power of Congress" and 2), the "*means* for [their achievement]" are consistent with due process. *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980). Both tests are met here.

As this Court reminded in *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting from *NBC v. United States*, 319 U.S. 190, 217 (1943)), "the goal of the

[Communications] Act is 'to secure the maximum benefits of radio to all the people of the United States,'" and the "Congress . . . granted the Commission broad discretion in determining how that goal could best be achieved." The minority enhancement policy was adopted because the Congress and the Commission deemed it essential to achievement of diversity to remedy the effects of "[t]he extreme underrepresentation of minorities in [broadcast] ownership, [which] has been exhaustively documented . . . ." *West Michigan, supra,* 735 F.2d 601, 603 n.5.[4] This Court has found the Commission's "policy of promoting the widest possible dissemination of information from diverse sources to be consistent

[4] In adopting the policy the Commission stated: "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 F.C.C.2d 979, 981 (1978).

In mandating reinstitution of the policy in 1987, the Congress cited the "important public policy goals" of "promoting diversity of ownership of broadcast properties," and noted its past support for such policies. S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). In one such earlier pronouncement, discussing the minority preference included in the legislation authorizing Commission use of a licensing lottery, the conference report identified "[t]he underlying policy objective of these preferences" as "promot[ion of] the diversification of media ownership and consequent diversification of programming content." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 17 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2261, 2284. The Report noted that diversifying the media by "promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in [broadcast] ownership" was designed both to "broaden the nature and type of information and programming disseminated to the public" and "remed[y] the past economic disadvantage to minorities which has limited their [media] entry . . . ." *Id.,* at 2287-88.

tent with both the public-interest standard and the First Amendment." *F.C.C. v. WNCN Listeners Guild,* 450 U.S. 582, 594 (1981).

While the petition "questions whether the promotion of program diversity is a compelling governmental interest" (Pet. 16) akin to that identified by Justice Powell in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), there is but one diversity to which the First Amendment is devoted. Freedom of expression is not the exclusive preserve of students; the First Amendment is in its essence inclusive.

Indeed, *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967), relied upon in *Bakke* (138 U.S. at 312), described the value of academic freedom by reference to the very diversity formulation by which that component of the Commission's public interest mandate has traditionally been described, that of Learned Hand in *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *affirmed,* 326 U.S. 1 (1945). The newspaper industry, he writes,

> serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

It is this "general interest" to which the minority enhancement policy is directly addressed, rather than any single component. The "national commitment to the safeguarding of [academic] freedoms" identified in *Bakke* (438 U.S. at 312) benefits some of us directly, the rest only by its training of our leaders (*Keyishian, supra,*

385 U.S. at 603); the diversity which it is the duty of the Commission to preserve benefits us all directly.

The means by which the Commission and the Congress have pursued this legitimate objective likewise meet the due process requirement of *Fullilove*, 448 U.S. at 473. The minority enhancement policy is "narrowly tailored" to meet its remedial objectives. *Id.*, at 480. First, the minority enhancement constitutes a single factor in a multi-factor comparative selection process as distinct from the "inflexible percentages solely based on race" disfavoured by the Court. *Id.*, at 473; *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728-29 (1989). The minority enhancement serves as a bonus equal to other non-race based factors such as local residence, past broadcast experience and local civic participation. Moreover, all of these factors are potentially outcome determinative only if competing applicants are deemed equal with respect to such other more important factors as diversification and quantitative integration.

Second, the minority enhancement was adopted only after ten years of regulatory efforts to rectify the "acute underrepresentation" of minorities through such race neutral alternative means as mandating community needs ascertainment, responsive program service and nondiscriminatory employment practices. *Minority Policy Statement, supra*, 68 F.C.C.2d 979-980 (1978); see *Croson, supra*, at 728. Despite favourable industry response to these measures, the Commission was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media," rendering "additional measures...necessary and appropriate.... [O]wnership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming," which "avoids direct government intrusion into programming decisions." *Id.*, at 980-81.

And third, the potential for misapplications of the program (*Fullilove, supra*, at 487-88) is slight. The Commission awards minority enhancements only after a full evidentiary hearing which includes opportunity for prehearing discovery and cross examination of witnesses prior to the issuance of an initial decision by an administrative law judge.

3. Finally, the suggestion that an intra-circuit conflict between panels of the District of Columbia Circuit requires review by this Court is without merit. Even if such a conflict existed, it would constitute no "special and important reason" for grant of certiorari under Rule 17 of this Court. The appropriate course in such a situation is a petition for rehearing and suggestion for rehearing en banc, which necessarily involves the full court. Such a petition, reciting the claim of conflict, was here filed and denied.[5] It is accordingly clear that the deciding court as a whole is satisfied that its actions are consistent.

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[5] A petition for rehearing and suggestion for rehearing en banc was also denied in the assertedly conflicting case, *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902 (D.C. Cir. 1989), *rehearing denied*, 876 F.2d 958, *petition for cert. filed sub nom. Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (Oct. 31, 1989), which held unconstitutional the Commission's minority distress sale policy permitting a licensee whose qualifications are in issue to sell its station prior to hearing at a below market price to a buyer with at least 20% minority ownership. In that case MacKinnon, J. filed an opinion in connection with his vote to deny rehearing and rehearing en banc (876 F.2d 954), in which he noted (876 F.2d at 956 n.2) that the instant case is distinguishable from *Shurberg* "on two material grounds. [*Metro*] involved (1) a comparative hearing and (2) the minority preference was only a *plus factor*. In *Shurberg* minority preference is an *absolute preference*. This case is not to be contrasted with a case which involved race as only one factor in a comparative licensing procedure."

In any event, the gravamen of the petitioner's assertion of conflict appears to be that if any race conscious action by the Commission may be found constitutionally infirm, then all must. That proposition is not only at odds with decades of appellate jurisprudence but also in conflict with this Court's observation that the Commission's equal employment opportunity rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. F.P.C.*, 425 U.S. 662, 670 n.7 (1976) (dicta).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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5 December 1989

MOTION FILED
DEC 5 1989

No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER METRO BROADCASTING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

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Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER METRO BROADCASTING

Pursuant to Supreme Court Rule 36.1, the Competitive Enterprise Institute (CEI) respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of petitioner Metro Broadcasting. Consent to the filing of this brief has been received from both the Acting Solicitor General, on behalf of the respondent Federal Communications Commission (FCC), and from Metro Broadcasting. (These consent letters have been lodged with the Clerk of this Court.) However, counsel for the second respondent in this case, Rainbow Broadcasting Company, has refused consent.

Rule 36.1 states that such motions are disfavored. Nonetheless, CEI submits that this motion is justified because it seeks to present to this Court a new constitutional issue in this case, one whose dimensions did not become apparent until *after* Metro Broadcasting had filed its certiorari petition. That issue is whether the "muzzling" laws that barred the FCC from reexamining its racial and gender preference policies for awarding broadcasting licenses violated the Recommendation Clause of the United States Constitution, Art. II, sec. 3, which provides that the President

> "shall . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient."

As the record in this case makes clear, these muzzling laws directly resulted in Metro Broadcasting's failure to receive the broadcast license here at issue.

In its "Questions Presented For Review", Metro challenged the constitutionality of these muzzling laws on equal protection grounds. However, on October 3, 1989, less than three weeks after Metro filed its certiorari petition, the Georgetown Law Journal published an in-depth study of the Recommendation Clause and its implications for such muzzling laws. Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989). The purpose of the attached amicus brief is to bring this new aspect of this constitutional controversy to this Court's attention and to urge that, should certiorari be granted, the Recommendation Clause issue be added to the questions presented for review.

CEI's interest in this issue is based on its involvement in communications policy and other regulatory matters. CEI is a nonprofit policy analysis organization, founded in 1984, dedicated to promoting private approaches to regulatory issues. In a number of areas in which CEI has been actively involved, such as antitrust policy and privatization, CEI has seen administrative reform efforts frozen by muzzling laws such as those involved here.

This case presents a particularly egregious example, involving the imposition of racial and gender preferences which the administering agency itself was in the midst of reexamining. It is an exceptionally appropriate setting for this Court to examine the validity of muzzling laws under the Recommendation Clause of the Constitution.

For these reasons, CEI's motion for leave to file the attached amicus brief should be granted.

Respectfully submitted,

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December 5, 1989

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IN THE

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---

BRIEF AMICUS CURIAE OF COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER METRO BROADCASTING

INTEREST OF AMICUS CURIAE

The interest of the Competitive Enterprise Institute (CEI) in this case is set forth in the preceding motion for leave to file this amicus brief.

SUMMARY OF ARGUMENT

Metro Broadcasting's petition for certiorari raises important constitutional issues regarding the Federal Communications Commission's (FCC) reliance on minority preferences in awarding broadcast licenses. After that petition was filed, however, a law review article was pub-

lished that establishes a new constitutional question in this case: whether the appropriations act "muzzling" provision that forced the FCC to cease its reexamination of minority preferences is valid under the Recommendation Clause of the Constitution, Article II, section 3. On the basis of a detailed examination of the clause's history and rationale, the article's author makes a persuasive case that such muzzling laws impermissibly restrict the President's ability to make policy recommendations to Congress.

For these reasons, certiorari should be granted in this case, and the questions presented for review should be expanded by this Court to include the Recommendation Clause issue.

ARGUMENT

THE CONFLICT BETWEEN CONGRESS' MUZZLING OF THE FCC AND THE RECOMMENDATION CLAUSE OF THE CONSTITUTION IS AN ISSUE THAT SHOULD BE ADDED TO THE 'CERTWORTHY' QUESTIONS PRESENTED IN THIS CASE

At issue in this case is the validity of the FCC's use of ethnic and gender preferences to deny a construction permit for a UHF television station in Florida to the petitioner, Metro Broadcasting. As the record makes clear, these preferences were the reason for the FCC's rejection of Metro Broadcasting in favor of its competitor, Rainbow Broadcasting. In the words of the court of appeals' decision below:

> "the Commission found that Rainbow had no clear quantitative advantage and that deletion of Rainbow's minority preference could reverse the outcome of the case." *Winter Park Communications, Inc. v. FCC*, 873 F.2d 349, 351 (D.C. Cir. 1989) (citation omitted), Appendix to Petition for Certiorari (App.) at 6a.

These minority preferences, however, were also the subject of a full-fledged reexamination proceeding by the FCC, and the agency suspended its decision on Metro's application pending the outcome of that proceeding. App. at 49a. Unfortunately, this reexamination was stopped dead in its tracks by the "muzzling" provision of the continuing resolution for fiscal year 1988, which barred the FCC from using its appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its minority and gender preferences in license proceedings. 873 F.2d at 351, App. at 6a, quoting from Pub. L. No. 100-202, 101 Stat. 1329 (1987). As a result, the FCC was forced to reinstate its rejection of Metro's application. App. at 51a.

In its petition for certiorari, filed on September 18, 1989, Metro challenged the constitutionality of this muzzling provision (and of a similar one in the 1989 appropriations act) on equal protection grounds. *See* "Questions Presented For Review", Metro Petition at i. Shortly thereafter, on October 3d, a lengthy article appeared in the Georgetown Law Journal making the novel and persuasive case that such muzzling laws violate the Recommendation Clause of the Constitution, Article II, section 3. Sidak, *The Recommendation Clause*, 77 Geo. L.J. 2079 (1989).

As is shown below, the constitutional issue raised in this article is an increasingly serious one. In the event that certiorari is granted in this case (as CEI believes it should be), this Court should exercise its power to expand the questions presented for review to include this issue.

The Recommendation Clause states that the President

> "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."

The recommendation of measures by the President is one of his two basic "functions in the lawmaking process". *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). It is this executive power that is directly at odds with muzzling laws. Defining such laws as "any legislation that impairs the Executive's ability to deploy resources to study or advocate a change in the federal government's policies on a particular issue", Mr. Sidak contends that

> "all muzzling laws implicate, and many violate, the principle of separation of powers. When Congress prohibits the President from studying or advocating a change in policy, it impairs the President's ability to perform his constitutional duty to inform Congress and make recommendations for its consideration." 77 Geo. L.J. at 2080.

Mr. Sidak begins with James Madison's notes on the Constitutional Convention, which demonstrate that the Framers, in changing the proposed wording of this phrase from "may recommend" to "shall recommend", "elevated the President's recommendation of measures from a political prerogative to a constitutional duty." *Id.* at 2081 (citation omitted). He traces this duty through President Woodrow Wilson's 1920 veto of a bill to restrict the printing of Executive Branch documents; in President Wilson's words, he would "not concede the right [of Congress] to prescribe 'regulations' under which executive departments may operate." *Id.* at 2098.

During the Reagan administration muzzling laws were enacted on a greatly expanded number of subjects, among them agricultural marketing orders, antitrust policy, privatization, and the FCC minority preferences that are at issue in this case. *Id.* at 2079-80, 2128-32. The administration's acceptance of these laws in no way foreclosed the question of their validity. "President Reagan's acquiescence to muzzling laws was itself unconstitutional,

for the President may not negotiate away his performance of an article II duty." *Id.* at 2135.

(As Mr. Sidak points out, even though the FCC is an independent agency, it exercises a substantial amount of executive power that has been delegated to it by the President. "Thus, Congress can no more abridge the FCC's ability to obey the recommendation clause than it can abridge the President's ability to do so." *Id.* at 2131.)

It is clear that the FCC muzzling law has a fundamental impact on the agency's ability to operate. The dissent from the panel's constitutional analysis in the decision below characterizes the muzzling provision as imposing "a kind of mental standstill" upon the FCC. 873 F.2d at 364, App. at 35a (Williams, J., concurring in part and dissenting in part). In *Shurberg Broadcasting, Inc. v. FCC*, in which another panel of the court of appeals issued a decision directly contrary to the one below, Judge Silberman pointed out in his separate opinion that the muzzling law

> "carries serious constitutional implications, because there is little difference between stripping a court of jurisdiction and stripping the Executive Branch or an independent agency of authority to comply with orders of the court." 876 F.2d 902, 925 n.39 (D.C. Cir. 1989), petition for certiorari pending sub nom. *Astroline Communications Co. v. Shurberg*, No. 89-700 (filed Oct. 30, 1989).

As is shown above, the Recommendation Clause issue raised by Mr. Sidak's article casts a new light on this controversy.

It is true that the issues before this Court are generally limited to those raised in the petition for certiorari. However, "it is undoubtedly within [the Court's] power to consider" other questions as well. *United States v. Leon*, 468 U.S. 897, 905 (1984); *see, e.g., Alexander v.*

Virginia, 408 U.S. 921 (1972) (new constitutional issue raised by the Court in granting certiorari "in addition to those questions presented in the petition"); *Neely v. Eby Construction Co.*, 382 U.S. 914 (1965) (two procedural issues added by the Court to the questions raised by petitioner). It would be highly appropriate for the Court to exercise this power in this particular case, and to consider the Recommendation Clause issue.

CONCLUSION

CEI submits that certiorari should be granted in this case, and that the issue of the FCC muzzling law's validity under the Recommendation Clause should be added to the questions which this Court will review.

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December 5, 1989

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No. 89-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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Certiorari Granted January 8, 1990

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By or Before the Federal Communications Commission:

DATE	ITEM
March 9, 1983	Hearing Designation Order by the Mass Media Bureau, Federal Communications Commission (hereinafter FCC), 48 Fed. Reg. 10917 (March 15, 1983)
August 22-26, 1983 and September 9, 1983	Hearing Sessions Convened
October 24, 1983	Proposed Findings of Fact and Conclusions of Law by Metro Broadcasting, Inc. (hereinafter Metro) and by Rainbow Broadcasting Company (hereinafter Rainbow)
October 31, 1983, November 4 & 7, 1983	Reply Findings of Fact and Conclusions of Law by Metro and by Rainbow
December 21, 1983	Initial Decision of Administrative Law Judge Walter C. Miller, published at 90 FCC 2d 1073 (ALJ 1983)
June 15, 1984	Consolidated Brief and Exceptions by Rainbow; Limited Exceptions by Metro
July 12 & 13, 1984	Reply Briefs by Metro and by Rainbow
September 26, 1984	Oral argument before the Review Board

[1] No reference is made to entries regarding former parties.

DATE	ITEM
December 3, 1984	Decision of the Review Board
January 16, 1985	Application for Review by Metro
February 5, 1985	Opposition to Application for Review by Rainbow
October 18, 1985	Order denying Application for Review

By or In the United States Court of Appeals for the District of Columbia Circuit:

DATE	ITEM
November 15, 1985	Notice of Appeal by Metro
December 3, 1985	Intervention by Rainbow
December 26, 1985	FCC Certified Index to Record
March 6, 1986	Metro Brief
May 12, 1986	FCC Brief
May 29, 1986	Rainbow Brief
June 12, 1986	Joint Appendix
October 21, 1986	Metro Motion for Remand
October 23, 1986	FCC Motion for Remand
October 27, 1986	Rainbow Comments in Response to Motion for Remand
November 5, 1986	Order granting Motions for Remand

By or Before the Federal Communications Commission:

DATE	ITEM
November 7, 1986	Order of the FCC General Counsel soliciting Comments on Remand

DATE	ITEM
November 18, 1986	Comments of Rainbow and Metro (filed separately)
December 1, 1986	Reply Comments of Metro and Rainbow (filed separately)
March 9, 1987	Memorandum Opinion and Order holding case in abeyance
February 23, 1988	Memorandum Opinion and Order reactivating denial of review

By or In the United States Court of Appeals for the District of Columbia Circuit:

DATE	ITEM
March 23, 1988	Metro Motion to Recall the Record
April 4, 1988	FCC Supplement to Certified List of Items in the Record
June 9, 1988	Order recalling the record
August 12, 1988	Metro Brief
August 29, 1988	Brief for the United States as Amicus Curiae
September 16, 1988	FCC Brief
October 4, 1988	Rainbow Brief
October 21, 1988	Metro Reply Brief
October 28, 1988	Supplemental Joint Appendix
November 21, 1988	Oral Argument
March 3, 1989	Metro Motion for Leave to File Supplemental Brief
March 17, 1989	Order denying Metro Motion for Leave to File Supplemental Brief

DATE	ITEM
April 21, 1989	Opinion of the District of Columbia Circuit
April 21, 1989	Order withholding issuance of mandate
April 21, 1989	Judgment
June 5, 1989	Metro Petition for Rehearing and Suggestion for Rehearing *En Banc*
June 21, 1989	Order denying petition for rehearing
June 21, 1989	Order denying suggestion for rehearing *en banc*
July 11, 1989	Mandate issued

ORDER GRANTING WRIT OF CERTIORARI

Supreme Court of the United States

No. 89-453

Metro Broadcasting, Inc.,

Petitioner

v.

Federal Communications Commission, *et al.*

ORDER ALLOWING CERTIORARI. Filed January 8, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to Questions 1 and 2 presented by the petition. The parties are directed to adhere to the following briefing schedule. The brief of the petitioner must be received by the Clerk on or before February 9, 1990. The brief of the respondents must be received by the Clerk on or before March 6, 1990, and a reply brief, if any, must be received by the Clerk on or before March 16, 1990.

January 8, 1990

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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER METRO BROADCASTING, INC.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988, 1989 and 1990 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

LIST OF PARTIES AND PARTIES' STRUCTURES

The parties in *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (consolidated case nos. 85-1755 and 85-1756) were appellants Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park), appellee Federal Communications Commission (FCC or Commission), intervenors Rainbow Broadcasting Company (Rainbow), City of Winter Park and Winter Park Chamber of Commerce, and amicus curiae United States of America. Winter Park, the Chamber and the City have no further interest in this case. The parties' structures are set forth in Metro's *Petition for Certiorari (Petition)*, at p. ii, which is incorporated herein by reference pursuant to Rule 29.1 of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER METRO BROADCASTING, INC.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (court of appeals or lower court), upholding the policies and enactments challenged herein is reported at 873 F.2d 347 (D.C. Cir. 1989), and reproduced at page 1a of the appendices to Metro Broadcasting Inc.'s (Metro's) petition for certiorari (Petition). (Pet. App. 1a).[1] The Decision of the Commission's Review

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[1] References to material contained in the Appendices attached to Metro's petition for certiorari herein shall be cited to the page at which such material appears; *i.e.*, Pet. App. 1a. References to material contained in the Joint Appendix filed contemporaneously herewith shall be cited to the page at which such material appears therein; *i.e.*, J.A. 1.

Board (Pet. App. 64a) to award a new UHF television station construction permit at Orlando, Florida to Rainbow Broadcasting Company (Rainbow) and deny the competing application of Metro[2] is published at 99 FCC 2d 688 (Rev. Bd. 1985). The FCC's Order (Pet. App. 60a) denying review of the Review Board's Decision is unpublished. The Commission's Memorandum Opinion and Order holding the proceeding in abeyance following remand by the court of appeals (Pet. App. 52a) is reported at 2 FCC Rcd 1474 (1987). The Commission's subsequent Memorandum Opinion and Order reactivating its affirmance of the Review Board's Decision following congressional directives in appropriations legislation for fiscal year 1988 (Pet. App. 48a) is published at 3 FCC Rcd 866 (1988).

JURISDICTION

The Opinion (Pet. App. 1a) and Judgment (Pet. App. 94a) of the court of appeals were entered on April 21, 1989, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc*. (Pet. App. 47a). Metro's petition for rehearing and suggestion for rehearing *en banc* was denied on June 21, 1989. (Pet. App. 96a). Metro's petition for a writ of certiorari was filed on September 18, 1989, and granted on January 8, 1990. (J.A. 5). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment thereto (Pet. App. 100a) and Sections 1 and 5 of the Fourteenth

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Material contained in the Supplemental Joint Appendix filed with the lower court shall be cited to the page at which such material appears therein; *i.e.*, S.J.A. 1. References to the statute reprinted in the Appendix hereto shall be cited to the page at which the relevant passage appears therein; *i.e.*, App. 1.

[2] The application of Winter Park Communications, Inc. (Winter Park) also was denied for reasons not here relevant.

Amendment thereto. (Pet. App. 100a). The germane sections of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982), *codified* at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A) (1987), are reprinted at Pet. App. 102a. The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987), are reproduced at Pet. App. 101a. The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth at Pet. App. 101a. The appropriate portions of the *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989), are attached hereto as Appendix (App.) A.[3]

STATEMENT OF THE CASE

Metro, petitioner, filed an application for a construction permit for a new television station on Channel 65 at Orlando, Florida, in 1982. Rainbow, respondent, filed its competing application later that year, and the two mutually exclusive applicants were pitted against one another in the crucible of a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended (Communications Act or the Act).[4] Because Rainbow received enhancement credits for its attributable 90% Hispanic and 5% female (included within the Hispanic attribution) ownership composition, it ultimately prevailed

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[3] The legislation was enacted following the filing of Metro's petition for certiorari and was not included therein. Nevertheless, the provisions which continue to stifle any attempt by the Commission to reexamine its race-ethnic- and gender-based preferences in comparative licensing proceedings are relevant to the instant case and govern the position taken by the FCC herein.

[4] 47 U.S.C. § 309(e) (1982); *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, 333 (1945).

under the Commission's race-, ethnic- and gender-based preference scheme. (Pet. App. 6a, 50a, 61a, 87a and 88a).[5]

A. The Evolution of the Commission's Comparative Process and the Development of Minority and Female Preferences Therein

The Communications Act directs that, in awarding radio and television licenses, the Commission determine whether its grant of a particular application will serve the "public convenience, interest and necessity." 47 U.S.C. § 307(a). *See also* 47 U.S.C. § 309(a). Pursuant to this mandate, each applicant for authority to construct a new broadcast station must meet certain basic qualifications[6] and, when mutually exclusive applications are filed, a comparative hearing must be held to determine which applicant is best able to serve the public interest.[7]

The procedures governing the Commission's comparative hearing process appear in Sections 309 and 311 of the Act. 47 U.S.C. §§ 309, 311. The Act, however, does not specify what factors the FCC must take into account in rendering its public interest determination. Prior to 1965, competing applicants were free to introduce evidence on any issue which they felt demonstrated their superior qualifications to operate a broadcast station on the frequency

[5] Metro received a minority enhancement credit for the 19.8% integrated ownership share of Elmer Neal Lincoln, a black male. *Metro Broadcasting, Inc.*, 96 FCC 2d 1073, 1088 (ALJ 1983) (S.J.A. 39); *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 703 (Rev. Bd. 1984) (Pet. App. 87a). However, the Commission's Review Board held that this was insufficient to overcome the "substantial preference" to be awarded Rainbow for its minority and female ownership structure. 99 FCC 2d at 703 (Pet. App. 87a).

[6] These include the submission of facts regarding the "citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station . . . ." 47 U.S.C. § 308(b).

[7] 47 U.S.C. § 309(e); *Ashbacker Radio Corp.*, 326 U.S. at 333 (1945).

in question,[8] and the adjudicative process provided little guidance as to the relative weights to be accorded various indicia of comparative merit.[9] Gradually, however, the Commission began to identify the factors to be used to choose the best qualified applicant.[10]

1. The *1965 Policy Statement*

In order to clarify its policies regarding the comparative criteria and their use in licensing proceedings, in 1965, the Commission issued its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*1965 Policy Statement*). The *1965 Policy Statement* explained that the two main goals for selection among qualified applicants were: (1) to effect the maximum diffusion of control of the media of mass communications ("diversification"); and (2) to achieve the best practicable service to the public. *Id.* at 394.

The *1965 Policy Statement* characterized the diversification factor as of "primary significance" in the FCC's licensing scheme. *Id.* Thus, applicants owning no existing media concerns were preferred over applicants with such interests.[11] The second factor enumerated in the *1965 Policy Statement*, participation in station operation by owners ("integration of ownership into management"), was held of "substantial importance" in securing the "best practicable service." Id. at 395. The Commission stated that cer-

[8] *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery)*, 4 FCC Rcd 2246, 2258, 2266 n. 15 (1989) (*Lottery Rulemaking*).

[9] *Id.* at 2258.

[10] *Id.*

[11] *Lottery Rulemaking*, 4 FCC Rcd at 2258. The Commission noted that other media interests in the principal community proposed to be served would be of most significance, followed by other interests in the remainder of the proposed service area and, finally, other interests in the United States. *1965 Policy Statement*, 1 FCC 2d at 394.

tain attributes of participating owners would be considered in weighing this criterion, including local residence, past participation in civic affairs within the service area, and prior broadcast experience. *Id.* at 396.

The *1965 Policy Statement* listed other factors which the Commission considered potentially significant. One was an applicant's planned program service. *Id.* at 397. Another was the past broadcast record of any applicant principal who previously participated in station ownership. *Id.* at 398. Finally, the Commission announced that, when appropriate, comparative consideration would be accorded to proposed efficiency of frequency use, *id.*, character qualifications, *id.* at 399, and any other "relevant and substantial factor" designated by the Commission. *Id.*

2. Judicial Directives: The Advent of Minority Preferences in Comparative Broadcast Proceedings

The criteria specified in the *1965 Policy Statement* were both race- and gender-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *reconsideration denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 FCC 2d 559 (1972), *rev'd*, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). Only an applicant's "experience, background, and knowledge of the community" were deemed appropriate considerations under the integration component of "best practicable service." 495 F.2d at 936. Both the Commission and its Review Board initially refused to consider an applicant's race as an independent[12] comparative factor in *Mid-Florida Television Corp.*, *supra*, maintaining that such

[12] The Review Board did not foreclose the possibility that an applicant could render a showing sufficient to establish that, in a particular case, black ownership could be considered. The Board merely noted that "such a showing is absent here . . . ." *Id.*

ownership "must be shown . . . to result in some public interest benefit." *Id.* at 18. Ultimately, this position was supplanted by the courts.

In *TV 9*, the D.C. Circuit rejected the Commission's argument that "the 'Communications Act, like the Constitution is color blind,' " holding that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. 495 F.2d at 936-38. The court rebuffed the Commission's demand that an applicant seeking minority credit provide assurance of superior community service attributable to such ownership, declaring that "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." *Id.* at 938. Thus was born the "programming diversity" defense that the Commission advances today. Subsequently, in *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the court refused to accept the FCC's view that credit for minority status should be recognized only where a nexus between race and program diversity is demonstrated, proclaiming that race presumptively would promote such diversity when minority owners are integrated into the management of a proposed station.[13]

Following the court's directives, the Commission concluded minority ownership and participation should receive credit in the comparative process, deciding enhancements would be awarded to minority applicants under the "best practicable service" criterion. *WPIX*, Inc., 68 FCC 2d 381, 411 (1978).[14] As originally conceived, this enhancement

[13] *Id.* at 1063. The court stated that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry . . . ." *Id.*

[14] The Commission also developed other policies designed to promote minority ownership of broadcast facilities through preferences, including the distress sale policy, which allows a broadcaster whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority-owned, or minority-controlled purchaser, and a policy of affording tax certificates to sellers

consisted of a "plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded a preference." *TV 9*, 495 F.2d at 941 n. 2.[15] *See also Garrett*, 513 F.2d at 1062 n. 40. However, in *Waters Broadcasting Corp.*, 91 FCC 2d 1260 (1982),[16] the modest "plus-factor" was elevated, *sub silentio*, to "significant weight." *Id.* at 1267.[17] Subsequent cases followed the revised *Waters* formula, and by 1986, the Commission referred to its minority[18] "enhancement" as a "preference policy," drawing no distinction between "merit" and "preference."[19]

of media properties where the purchaser is minority-owned or minority-controlled. *Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce* (Oct. 2, 1986). Three weeks before a panel of the court of appeals decided this case, a different panel of the same court, in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 901 (D.C. Cir. 1989) struck down the Commission's distress sale policy. This Court granted Astroline Communications' petition for certiorari in the distress sale case on January 8, 1990 (Case No. 89-700), and will hear oral arguments on the distress sale policy following consideration of the issues presented herein.

[15] The *TV 9* court distinguished between the award of a preference and the recognition of merit, claiming the minority factor to be one of merit only. The court stated:

> We use "preference" to mean a decision by the Commission that the qualifications of a particular applicant in a comparative hearing are superior to those of another applicant with respect to one or more of the issues upon which the grant of a permit or license turns. "Merit" or "favorable consideration" is a recognition by the Commission that a particular applicant has demonstrated certain positive qualities which may but do not necessarily result in a preference. "Merit," therefore, is not a "preference" but a plus-factor weighed along with all other relevant factors in determining which applicant is to be awarded a preference. *Id.* at 941 n. 2.

[16] *aff'd sub nom., West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984).

[17] In *Waters*, the Commission admonished its Review Board for according insufficient weight to the "minority ownership" factor in its comparison between a non-local minority female and a local, non-minority applicant that was equal on the primary criterion of diversification and superior on every other standard comparative factor (i.e., integration of ownership with management, local residence, local civic activities), reversing the Board's award of the construction permit to the local applicant and awarding the construction permit to the minority female. *Id.*

[18] The Commission's early decisions, as well as the court cases discussed *supra*, considered the use of an enhancement factor for "black" ownership and participation, rather than for minority ownership generally. However, following Congress' passage of § 115 of the *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (codified at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (Pet. App. 102a), which required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission, the FCC began to award enhancements for ownership and participation by Hispanics, American Indians, Alaska Natives and Pacific Islanders. *E.g., Metro Broadcasting, Inc.*, 99 FCC 2d at 704. (Pet. App. 88a).

[19] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), *modified*, 2 FCC Rcd 2377 (1987).

[20] The decision had its genesis in an opinion written upon reconsideration in *Gainesville Media, Inc.* 70 FCC 2d 143 (Rev. Bd. 1978), where the Review Board simply stated that, "[u]pon further reflection, we now believe the better course is to consider female ownership and participation, despite the absence of record evidence regarding the [extent of female ownership in the mass media in Gainesville]." *Id.* at 149. The preference did not alter the outcome of the *Gainesville* proceeding.

3. The Commission's Adoption of Gender-Based Preference Classifications

The FCC's Review Board extended the minority preference to females in *Mid-Florida Television Corp.*, 70 FCC 2d 281 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).[20] The Board stated that merit was warranted for female ownership and participation "upon essentially the same basis as the merit given for black ownership and participation." *Id.* at 326. Nevertheless, the Board concluded that the preference should be somewhat

less significant because "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks." *Id.* The Commission later acquiesced in the Board's decision,[21] and the female preference was established.

4. The Mechanics of Modern Comparative Selection

The Commission's comparative process has grown more complex in the 25 years following release of the *1965 Policy Statement*. Changes in the process have resulted in a shift of emphasis in comparative proceedings. Although the *1965 Policy Statement* remains the departure point for comparative analysis, through time, some factors have proven less significant than anticipated by the Commission and others have assumed greater importance.

a. Diversification

Diversification of ownership of mass media, the FCC's primary comparative criterion, is of such overwhelming importance, e.g., *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 697 (1978), that it is seldom a factor in modern comparative rankings. Under the diversification criterion, interests in other communications media push an applicant below its comparative starting point. *WPIX, Inc.*, 68 FCC 2d at 385. "[A]n applicant having no other attributable mass media interests will all but certainly prevail over a party with such interests." *Newton Television, Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), *modified*, 4 FCC Rcd 2561 (1989). Persons with other media interests thus frequently refrain from entering the comparative fray. Those who join the comparative process, however, often can avoid scrutiny under the diversification criterion. First, applicant principals may pledge to divest themselves of existing holdings upon grant of their applications, thus avoiding a diversification demerit. *E.g.*, *J.T.*

[21] *E.g.*, *Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601, 602-03 (1984).

Parker Broadcasting Corp., 4 FCC Rcd 5729 (ALJ 1989).[22] *Accord, FM Broadcast Assignments*, 101 FCC 2d 638 (1985). Second, parties may structure their applications to avail themselves of FCC policies preventing the attribution of media interests held by passive investors.[23] Accordingly, an astute applicant may avoid diversification considerations, regardless of whether the applicant or its principals have other media interests.

b. Best Practicable Service: Quantitative Integration of Ownership Into Management

Although ostensibly less weighty than the diversification criterion,[24] the quantitative degree to which new station owners propose to be integrated into management, as enhanced by certain qualitative attributes that elevate the applicant for comparative purposes,[25] remains the predominant consideration under the Commission's "best practicable service" factor.[26] Quantitative credit is calculated by

[22] In one recent case, *Richardson Broadcasting Group*, FCC 89D-50 (ALJ released November 9, 1989), a Commission administrative law judge noted that "[i]t has become standard practice for an FM applicant to avoid a comparative diversification demerit simply by pledging to divest themselves of their existing aural holdings if they are granted. . . . [C]rediting an FM applicant's divestment pledge, even a good faith pledge . . . allows the applicant to skirt the Commission's goal of diffusing control of mass communications media." *Id.* at n. 10.

[23] See *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *modified*, 58 RR 2d 604 (1985), clarified, 1 FCC Rcd 802 (1986) (*Ownership Attribution*); *Daytona Broadcasting Co. Inc.*, 103 FCC 2d 931, 934-935 (1986) (making applicable the criteria set forth in *Ownership Attribution* to comparative cases for diversification purposes). *See also Payne Communications, Inc.* 1 FCC Rcd 1052 (Rev. Bd. 1986).

[24] *E.g.*, *Snake River Television, Inc.*, 26 FCC 2d 380 (Rev. Bd. 1970).

[25] *WPIX, Inc.*, 68 FCC 2d 381.

[26] *E.g.*, *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1982), *reconsideration denied*, 89 FCC 2d 631 (1983); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982).

determining the voting ownership interest[27] of each integrated principal, and totaling it within four categories of planned participation at the new station: full-time, substantial, part-time and none.[28] Such credit is critical in comparative proceedings because qualitative attributes cannot overcome clear quantitative differences in integration.[29]

The difficulty in attempting to evaluate the veracity of an applicant's integration pledge, coupled with the desire of each applicant to maximize consideration of qualitative attributes, has rendered the quantitative calculation of limited significance. Most applicants propose 100% quantitative integration, or close to it, to maximize credit for various enhancement factors. Moreover, current FCC policies permit an applicant to structure its application so that principals not intending to participate in station management are not counted in the quantitative calculation.[30] The proliferation of "two-tiered" organizational structures, in which limited partners or non-voting shareholders hold ownership interests in an applicant but are not counted

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[27] *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983).

[28] For example, an applicant with four voting shareholders, each holding a 25% equity interest which proposes to integrate three of its shareholders full-time into the management of the new station would receive a 75% full-time quantitative integration credit.

[29] *Committee for Community Access* v. *FCC*, 737 F.2d 74 (D.C. Cir. 1984); *Absolutely Great Radio, Inc.*, 55 Rad. Reg. 2d (P&F) 15, 21 (1983); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1980); *Van Buren Community Service Broadcaster, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1980); *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978). In *Merrimack*, the Commission's Review Board noted that "in the seventeen years of comparative proceedings under the *1965 Policy Statement*, no case of which we are aware has been decided where the applicant with the clear quantitative integration advantage did not receive the preference under this criterion." *Id.*

[30] See *Ownership Attribution*, 1 FCC Rcd 802 (1985); *Anax Broadcasting, Inc.* 87 FCC 2d 483 (1981); *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989); *Daytona Broadcasting Co. Inc.*, 103 FCC 2d 931 (1986); *Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1988).

for integration[31] prompted one FCC administrative law judge to note that "[w]ith ever increasing frequency, broadcast applications are being structured to claim maximum integration and enhancement credit."[32] Accordingly, determinations regarding integration of ownership into management (and thus, "best practicable service") invariably turn on qualitative enhancement factors, or preferences.[33]

c. Best Practicable Service: Qualitative Integration Enhancement Factors

The qualitative attributes of participating owners which can enhance an applicant's quantitative integration proposal in FCC proceedings have not changed significantly since the *1965 Policy Statement*. However, the addition of minority and female preferences to the enhancement scheme and the frequent presence of two-tiered ownership structures, have affected the relative weights of the enhancement factors, which currently are: (1) present or proposed local residence by integrated personnel in the station's community or proposed service area; (2) the degree to which minority and female owners will be integrated into station management; (3) past participation in civic activities within the community of license or proposed service area, and (4) the past broadcast experience of integrated principals.[34] The most significant modern en-

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[31] An applicant consisting of 2 voting shareholders, each with a 25% ownership interest and proposing 100% integration into management, and 2 non-voting shareholders, each with a 25% ownership interest but not proposing integration, for example, receives 100% quantitative credit and only attributes of its voting shareholders are considered for qualitative comparative purposes.

[32] *Pacific Television, Ltd.*, FCC 86D-43, slip op. (ALJ released July 26, 1986). The administrative law judge went on to remark that "it is simply unjust to allow an applicant to benefit from a sham arrangement designed to create the illusion of maximum integration credit to the detriment of a competing legitimate applicant." *Id.*

[33] *E.g., Independent Masters, Ltd*, 104 FCC 2d 178, par. 17 (Rev. Bd. 1986).

[34] *Lottery Rulemaking*, 4 FCC Rcd 2246, 2259 (1989).

hancement factors are local residence and minority or female status. Local residence and minority status ostensibly are co-equal in weight.[35] Female status is entitled to somewhat less weight than minority status,[36] but, as noted, the exact weight of the female enhancement remains uncertain. Civic participation, considered part of a proposed owner's local residence background, is close on the heels of the foregoing in terms of importance.[37] Past broadcast experience, a distant last, usually is only a tie-breaker. *Id.*

FCC administrative law judges award preferences to applicants based on these enhancement factors, ranging from "overwhelming" to "substantial" to "moderate" to "slight" to "very slight."[38] In making this determination, the enhancements are viewed within their attributable, quantitative contexts. For example, a corporate applicant consisting of three $33^1/_3\%$ shareholders, one local resident with voting privileges and two non-residents without voting rights, proposing to integrate the voting shareholder into management, would be entitled to enhancement credit for its proposed 100% local resident ownership structure; the non-voting shareholder's attributes would not be considered. Thus, careful attention paid to structuring an application often can assure victory under the "best practicable service" criterion for those maximizing use of the Commission's enhancement and attribution policies.

d. Other Comparative Factors

The *1965 Policy Statement* specified other factors once considered of comparative significance. However, in mod-

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[35] *E.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985); *Linda Crook*, 3 FCC Rcd 354 (1988). *But see Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1267 (1982) (where Commission allowed a minority female from a distant city to prevail over a local, non-minority applicant that was superior on every other comparative factor).

[36] *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).

[37] *1965 Policy Statement*, 1 FCC 2d at 396.

[38] *Lottery Rulemaking*, 4 FCC Rcd at 2259.

ern comparative proceedings, those factors are of limited import. The criteria for proposed program service[39] and past broadcast record,[40] for example, almost never are at issue in comparative decisions.[41] The criterion for efficient use of a frequency,[42] known today as "comparative coverage," also seldom is at issue because the credit awarded for bringing service to more persons is generally only "very slight."[43] In 1986, the Commission announced that character issues would no longer be relevant in comparative proceedings where consideration of such issues would not result in disqualification.[44] Thus, the Commission's quantitative and qualitative integration assessments under the "best practicable service" criterion remain dispositive in most cases

5. Application of the Minority and Female Preferences in the Instant Case.

This case was decided, not surprisingly, under the Commission's "best practicable service" criterion. The Review Board awarded Metro a "79.2% full-time plus 19.8% part-

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[39] *1965 Policy Statement*, 1 FCC 2d at 397.

[40] *Id.* at 398.

[41] *Lottery Rulemaking*, 4 FCC Rcd at 2266 n. 17. Applicants seeking to add such issues to FCC proceedings first must provide an extremely stringent threshold evidentiary showing demonstrating the unusual record of their past broadcast records or unusual superior devotion to public service as a result of their programming proposal. The required showing rarely is met. *E.g. Commercial Radio Institute*, 78 FCC 2d 1016 (Rev. Bd. 1980); *Gilbert Group Inc.*, 49 Rad. Reg. 2d 1081, 1082 (P & F) (1981); *Omaha TV 15*, 4 FCC Rcd 730 (1989).

[42] *1965 Policy Statement*, 1 FCC 2d at 398.

[43] *E.g., Armando Garcia*, FCC 87D-25 (ALJ 1987); *Alan K. Levin*, 96 FCC 2d 710 (Rev. Bd. 1984); *Cotton Broadcasting Company*, 60 Rad. Reg. 2d 92, 95 (P & F) (Rev. Bd. 1986) (where the Board only awarded a very slight coverage preference where an applicant served 118,000 more people).

[44] *Report, Order and Policy Statement Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *reconsideration denied*, 1 FCC Rcd 421 (1986).

time quantitative integration credit" and Rainbow a "90% full-time credit." 99 FCC 2d at 703. (Pet. App. 86a). Rainbow's quantitative advantage was insufficient to be decisional. 2 FCC Rcd at 1475. (Pet. App. 56a). Therefore, the Commission examined the parties' qualitative attributes, and the minority and female preferences were found dispositive. Metro prevailed on the local residence and civic participation qualitative attributes. However, after emphasizing that Rainbow had 90% hispanic ownership participation, whereas Metro had only one 19.8% principal who was black,[45] the Board concluded that "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage (5% vs. Metro's 0%) and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage." 99 FCC 2d at 704. (Pet. App. 88a). The Commission's subsequent denial of Metro's application for review (Pet. App. 62a) transformed the Review Board's Decision into that of the Commission, pursuant to Section 155 of the Communications Act. 47 U.S.C. § 155(c)(3).[46]

B. The Commission's Reexamination of Its Preferences in *Steele* and Remand of the Instant Case From the Lower Court

The Commission's race-, ethnic- and gender-based preference policies entered a state of flux following a challenge to the female preference in *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). In *Steele*, a panel held that "the Commission exceeded its authority under the Federal Communications Act by adopting a female preference in comparative broadcast proceedings." *Id.* at 1199. The D.C.

[45] *Metro Broadcasting, Inc.*, 99 FCC 2d at 704 (Rev. Bd. 1984).

[46] On remand, discussed *infra* at 17, the Commission acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." Metro Broadcasting, Inc., 2 FCC Rcd at 1475. (Pet. App. 56a).

Circuit, sitting *en banc*, vacated the panel decision, granted rehearing, and called for rebriefing,[47] after the instant case had been briefed and awaited oral argument.

Before the *en banc Steele* court, the FCC submitted a motion for remand (S.J.A. 95) with its brief on the merits (S.J.A. 57), and concurrently released a *Public Notice*, FCC 86-387 (Sept. 15, 1986) (Pet. App. 106a), announcing its conclusions that both its gender and minority preference policies were indefensible on the record as it stood. In its brief, the Commission admitted that it "had neither constitutional authority nor statutory basis for the female preference," and requested remand for further consideration. (S.J.A. 76, 78). The Commission proclaimed in its motion for remand that "race, sex or national origin per se should not be a basis for licensing determinations," (S.J.A. 96), expressing its disbelief that "a sufficient foundation [existed] to satisfy statutory review requirements or the heightened scrutiny the Constitution requires of racial or gender based preferences." (S.J.A. 96). Through its *Public Notice*, the Commission announced that it would be "instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*," *Public Notice* (Pet. App.107a), and reiterated that "racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an 'exceedingly persuasive justification.' "[48] *Id.* (Pet. App. 107a).

The *en banc Steele* court granted the FCC's request, remanding *Steele* "in order to permit the agency to reexamine the bases for its minority and female preference policies."[49] The record in this case was remanded for the same purpose,[50] and, in due course, the Commission, by

[47] *Steele* never reached an *en banc* circuit decision because the case subsequently was settled. *James U. Steele*, 4 FCC Rcd 4700 (1989).

[48] (citing *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)).

[49] *Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (Pet. App. 48a).

[50] *Id.* The record in *Shurberg*, 876 F.2d 901, the case involving the Commission's distress sale policies, also was remanded at this time. 876 F.2d at 927 (MacKinnon, J., concurring in judgment).

Notice of Inquiry, opened MM Docket No. 86-484, encaptioned *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), modified, 2 FCC Rcd 2377 (1987) (*Racial, Ethnic or Gender Classifications*, or *Inquiry*).

The Commission collected evidence from numerous parties regarding its minority and female preference policies but the *Inquiry* was doomed on December 22, 1987, when the President signed *House Joint Resolution 395* into law. *Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988); *Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-102, 101 Stat. 1329 (1987) (*1988 Appropriations Act*).

C. Congressional Entrenchment of the Commission's Preference Policies and the Disposition of This Case by the Court of Appeals

The *1988 Appropriations Act*, which contained the funding legislation for fiscal year 1988, directed the FCC, *inter alia*, "to close MM Docket No. 86-484 with a reinstatement of prior policy" with respect to "minority and women ownership of broadcasting licenses . . . . " *1988 Appropriations Act*. (Pet. App. 100a). The Committee Report which resulted in this provision instructed the FCC to resolve, within 60 days, "all proceedings that have been remanded by the court of appeals . . . in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership,"[51] specifically referencing the instant case.[52] Following the enactment of the *1988 Appropriations Act*, the Commission abandoned its *Inquiry*, decided all cases held in abeyance pursuant to its order therein, and began to reapply its race-, ethnic- and gender-based preferences in comparative proceedings. *E.g.*, *Faith Center, Inc.*, 3 FCC Rcd 868 (1988). The Commission also reactivated its earlier affirmance of the Review Board's Decision in this case, which awarded the Orlando construction permit to Rainbow on the basis of the minority and female preferences. *Metro Broadcasting, Inc.* 3 FCC Rcd 866. (Pet. App. 48a).

With *Racial, Ethnic or Gender Classifications* closed down, *Winter Park*, on Metro's motion, was recalled by the court of appeals, rebriefed, argued and decided. Between oral argument and decision, this Court decided *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*), which should have influenced the lower court's ruling. Recognizing this, Metro lodged a Supplemental Brief with the lower court.[53] However, Metro's motion for leave to file the brief was denied and the brief rejected. (Pet. App. 104a).

The court of appeals, in a split decision, upheld both the constitutionality of the Commission's preference policies, and the award of the Orlando construction permit to Rainbow. 873 F.2d at 349. (Pet. App. 2a). On September 18, 1989, Metro petitioned this Court for a writ of certiorari, which petition was granted on January 8, 1990. (J.A. 5).

SUMMARY OF ARGUMENT

The Commission's race-, ethnic- and gender-based preferences violate the equal protection component of the Due Process Clause for a number of reasons and in a number of ways. The minority preferences were developed by the FCC following two District of Columbia Circuit opinions—*TV 9*, 495 F.2d 929 and *Garrett*, 513 F.2d 1056—where

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[51] Rep. No. 100-182, 100th Cong., 1st Sess. (1987) (S.J.A. 54).

[52] *Id.* Similar language was incorporated into the appropriations legislation for fiscal years 1989, *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (December, 1988) (*1989 Appropriations Act*) (Pet. App. 101a), and 1990. *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Pub. L. 101-162, 103 Stat. 988 (November, 1989) (*1990 Appropriations Act*) (App. 1a).

[53] A copy of Metro's Supplemental Brief has been submitted to this Court.

the agency was reversed for not awarding "merit" for black ownership participation. In *TV 9*, the court held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." 495 F.2d at 938. In *Garrett* the court said "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry . . . . " 513 F.2d at 1063. Merit meant nothing more than a plus-factor. *TV 9*, 495 F.2d at 941 n. 2.

The Commission on its own up-graded the plus-factor to a factor of "significant weight" in *Waters*, 91 FCC 2d 1260, 1267 (1982). It had no record before it on which to base this change of policy; indeed the opposite was true in that the comparative proceeding at hand was for an FM permit in western Michigan where there were few minorities. Ever since, the favoritism afforded for racial and ethnic status has been deemed a "preference," and is today at the top of the list—a very short list.

In 1978 the Review Board extended the minority preference to female applicants in *Mid-Florida Television Corp.*, 70 FCC 2d 281, for no other reason than "upon essentially the same basis as the merit given for black ownership and participation. *Id.* at 326. The female preference carries less weight than the minority preference, but how much less no one knows.

The foregoing scenario violates every conceivable equal protection tenet. Fostering of program diversity, where it is known by the Commission to already have been achieved in the marketplace, is neither a compelling nor an important governmental interest. The Commission has acknowledged candidly that the record as it currently exists bears no support for the preferences—they are not the remedial product of any prior discrimination by the FCC, nor is their purpose to remedy any kind of past discrimination. They rest on the unproven assumption that Hispanics are likely to program for Hispanics, blacks for blacks and women for women—all of which is absurd. The evidence

that does exist is that licensees are driven by market forces.

The only appropriate standard of review is that of "strict scrutiny," both for race/ethnicity and for gender. In addition to failing the compelling governmental interest test, the FCC's preferences fail the narrow tailoring test. They are open-ended as to time and application. Moreover, the "diversity" they are designed to promote is stereotyping, with no record to support it and bearing no relationship to student body diversity in the academic setting.

In 1982 Congress amended the Communications Act to provide that if the Commission were to employ lotteries as its selection process, minority preferences must be incorporated into the weighing process. Program diversity and underrepresentation were mentioned in the spartan legislative history. Gender was not the subject of the bill. In any event, the Commission has never adopted lotteries as its method of selecting winning applicants in full-power broadcast proceedings, making the lottery statute irrelevant herein. In 1987, in an appropriations bill, Congress defunded the Commission's first and only effort to determine whether a nexus exists between ownership composition and program diversity and required the FCC to restore its minority and gender preferences. However, appropriations measures are not entitled to the deference accorded substantive acts of Congress.

ARGUMENT

I. The FCC's Race-, Ethnic-, and Gender-Based Preference Policies Violate The Equal Protection Component Of The Due Process Clause Of The Constitution Of The United States Of America.

Although the *TV 9* majority was cautious to explain that it was not directing the FCC to adopt a "new comparative policy of awarding preferences for Black or minority ownership, per se," 495 F.2d at 941 and nn. 2, 3,[54] the me-

[54] *See also* discussion at p. 8, *supra*.

chanics of modern comparative selection assure that the original "plus factor" of preferential merit is dispositive in all but a few cases. First, preferential treatment was extended to women. Consequently, approximately 75% of the U.S. population—everyone with the exception of caucasian males[55]—currently is afforded strong preferential treatment for new broadcast opportunities. Second, the modest "plus factor" ordered by the *TV 9* court was elevated to "significant weight" in *Waters*, 91 FCC 2d at 1267, and subsequent licensing cases apply this formula. Third, through use of limited partnership equity or nonvoting stock,[56] applicants now may shield principals who do not propose to actively integrate into station management or those with other media interests from comparative consideration, offer token equity to minority and/or female principals so as to claim 100% minority and/or female ownership integration credit, and prevail easily over any nonpreferred applicant.[57] In sum, because both the diversification criterion and quantitative ownership integration factor may be neutralized by a perceptive applicant, the minority and/or female "enhancements" are, in most cases, all that remains for the FCC to consider in awarding a new broadcast station license.

The effect of these developments is that white male applicants seldom have prevailed in broadcast comparative contests in recent years, leading one veteran FCC administrative law judge to observe in 1984 that two applicants had "deluded themselves into believing white males can prevail in a standard comparative setting at this point in time." *Debra D. Carrigan*, 100 FCC 2d 741, 759-760 n. 23 (ALJ 1984).[58] Bearing out this cynicism is the fact that, in 51 of the 78 most recently reported commercial broadcast licensing cases, applicants said to be owned or controlled by minorities or females have prevailed in initial comparative decisions.[59] This appears to be not a "modest

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[55] When, to the female preference, there is added the preference for "Blacks, Hispanics, American Indians, Alaska Natives, and Pacific Islanders." *See* 47 U.S.C. § 309(i)(3)(c)(ii), P.L. 97-259, 96 Stat. 1087, and discussion at n.18, *supra*.

[56] *E.g., United American Telecasters, Inc.* v. *FCC*, 801 F.2d 1436 (D.C. Cir. 1986); *Pacific Television, Ltd.*, 2 FCC Rcd 1101 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988). *See also* discussion at pp. 11, 12, *supra*.

[57] *See* discussion at p. 13, *supra*.

[58] A female applicant ultimately prevailed in that case. *Debra D. Carrigan*, 100 FCC 2d 721 (Rev. Bd. 1985), *aff'd per judgment sub nom., Bernstein/Rein Advertising, Inc.* v. *FCC*, 830 F.2d 1188 (D.C. Cir. 1987).

[59] *Duane Tomko*, 2 FCC Rcd 206 (ALJ 1987) (minority); *Tulsa Broadcasting Group*, 2 FCC Rcd 1149 (ALJ 1987)(minority and female); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223 (ALJ 1987) (minority and female); *Irving A. Uram*, 2 FCC Rcd 1710 (ALJ 1987) (white male); *Charles Ray Shinn*, 2 FCC Rcd 2234 (ALJ 1987) (white male); *Moore Broadcast Industries*, 2 FCC Rcd 2754 (ALJ 1987) (female); *James and Sharon Leon Sepulveda*, 2 FCC Rcd 2937 (ALJ 1987) (minority and female); *Dalton Television Associates, Ltd.*, 2 FCC Rcd 2940 (ALJ 1987) (minority); *Linda Crook*, 2 FCC Rcd 3511 (ALJ 1987) (female); *Armando Garcia*, 2 FCC Rcd 4166 (ALJ 1987) (minority); *Elijah Broadcasting Corp.*, 2 FCC Rcd 4468 (ALJ 1987) (white male); *Bogner Newton Corp.*, 2 FCC Rcd 4792 (ALJ 1987) (minority); *Washoe Shoshone Broadcasting*, 2 FCC Rcd 5362 (ALJ 1987) (minority and female); *Thompson Broadcasting of Battle Creek, Inc.*, 2 FCC Rcd 5926 (ALJ 1987) (white male); *Mark L. Wodlinger*, 2 FCC Rcd 6027 (ALJ 1987) (white male); *Hispanic Keys Broadcasting Corp.*, 2 FCC Rcd 6255 (ALJ 1987) (minority); *Religious Broadcasting Network*, 2 FCC Rcd 6561 (ALJ 1987) (minority and female); *Gali Communications, Inc.*, 2 FCC Rcd 6967 (ALJ 1987) (minority and female); *Priscilla L. Schwier*, 2 FCC Rcd 7153 (ALJ 1987) (white male); *Genese Communications, Inc.*, 2 FCC Rcd 7252 (ALJ 1987) (minority and female); *Progressive Communications*, 3 FCC Rcd 386 (ALJ 1988) (white male); *Northampton Media Associates*, 3 FCC Rcd 570 (ALJ 1988) (minority and female); *Elaine Eicher*, 3 FCC Rcd 812 (ALJ 1988) (female); *Catherine Juanita Henry*, 3 FCC Rcd 1492 (ALJ 1988) (minority and female); *UN2JC Communications (Limited)*, 3 FCC Rcd 2243 (ALJ 1988) (minority and female); *62 Broadcasting, Inc.*, 3 FCC Rcd 4429 (ALJ 1988) (minority and female); *Marlin Broadcasting of Central Florida, Inc.*, 3 FCC Rcd 4699 (ALJ 1988) (minority and female); *William S. Daugherty, III*, 3 FCC Rcd 4999 (ALJ 1988) (female); *Evangel Communications, Inc.*, 3 FCC Rcd 5421 (ALJ 1988) (white male); *Port Huron Family Radio, Inc.* 3 FCC Rcd 5562 (ALJ 1988) (white male); *Nirvana Radio Broadcasting Corp.*, 3 FCC Rcd 6038 (ALJ 1988) (white male); *JAM Communications, Inc.*, 3 FCC Rcd 6285 (ALJ 1988) (minority and female); *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (ALJ 1988) (minority and female); *DLBS, Incorporated*, 3 FCC Rcd 6710 (ALJ 1988) (minority and female); *GNOL Broadcasting,*

plus," but a deck stacked in favor of those who fit certain racial, ethnic and/or gender classifications.

The invidiousness of this outcome and the governmental process at work to achieve it, directly implicate constitu-

Inc., 3 FCC Rcd 6796 (ALJ 1988) (white male); *Pontchartrain Broadcasting Company, Inc.*, 3 FCC Rcd 6800 (ALJ 1988) (minority and female); *The Baltimore Radio Show, Inc.*, 3 FCC Rcd 6823 (ALJ 1988) (minority and female); *Richard P. Bott, II*, 3 FCC Rcd 7094 (ALJ 1988) (white male); *William M. Piner*, 3 FCC Rcd 7101 (ALJ 1988) (minority and female); *Ramon Rodriguez & Associates*, 4 FCC Rcd 370 (ALJ 1989) (minority and female); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581 (ALJ 1989) (minority); *Corydon Broadcasters, Ltd.*, 4 FCC Rcd 1537 (ALJ 1989) (minority and female); *Community Broadcasting Company, Inc.*, 4 FCC Rcd 1986 (ALJ 1989) (female); *Berea Broadcasting Co., Inc.*, 4 FCC Rcd 2341 (ALJ 1989) (female); *Coastal Broadcasting Partners*, 4 FCC Rcd 2345 (ALJ 1989) (minority and female); *Salinas Broadcasting*, 4 FCC Rcd 2762 (ALJ 1989) (white male); *Renee Marie Kramer*, 4 FCC Rcd 2848 (ALJ 1989) (minority and female); *Rockledge Radio, Ltd.*, 4 FCC Rcd 3465 (ALJ 1989) (white male); *Charisma Broadcasting Corp.*, 4 FCC Rcd 4018 (ALJ 1989) (minority and female); *Perry Television, Inc.*, 4 FCC Rcd 4063 (ALJ 1989) (minority); *John Jay Iselin*, 4 FCC Rcd 4622 (ALJ 1989) (white male); *Aspen FM, Inc.*, 4 FCC Rcd 4462 (ALJ 1989) (white male); *George Henry Clay*, 4 FCC Rcd 4564 (ALJ 1989) (minority); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310 (ALJ 1989) (minority and female); *Global Information Technologies, Inc.*, 4 FCC Rcd 5445 (ALJ 1989) (female); *Radio Delaware, Inc.*, 4 FCC Rcd 5555 (ALJ 1989) (female); *Anchor Broadcasting, Limited Partnership*, 4 FCC Rcd 5687 (ALJ 1989) (minority); *Shaun Phalen*, 4 FCC Rcd 5714 (ALJ 1989) (female); *J.T. Parker Broadcasting Corp.*, 4 FCC Rcd5729 (ALJ 1989) (white male); *Colonial Communications, Inc.*, 4 FCC Rcd 5969 (ALJ 1989) (female); *Julia S. Zozaga*, 4 FCC Rcd 6271 (ALJ 1989) (white male); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6453 (ALJ 1989) (minority); *Rayne Broadcasting Co., Inc.*, 4 FCC Rcd 6760 (ALJ 1989) (minority and female); *Inlet Broadcasting, Co.*, 4 FCC Rcd 6760 (ALJ 1989) (white male); *Advanced Broadcast Technologies, Inc.*, 4 FCC Rcd 6821 (ALJ 1989) (white male); *Ronald Sorenson*, 4 FCC Rcd 6961 (ALJ 1989) (white male); *Don H. Barden*, 4 FCC Rcd 7043 (ALJ 1989) (minority and female); *Adlai E. Stevenson IV*, 4 FCC Rcd 7153 (ALJ 1989) (white male); *Ocean Pines LPB Broadcast Corp.*, 4 FCC Rcd 7767 (ALJ 1989) (white male); *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7082 (ALJ 1989) (minority); *Carta Corporation*, 4 FCC Rcd 7973 (ALJ 1989) (minority); *Richardson Broadcasting Group*, 4 FCC Rcd 7989 (ALJ 1989) (minority); *Sarasota-Charlotte Broadcasting*

tional prohibitions. The Equal Protection Clause of the Fourteenth Amendment commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[60] a directive that all persons similarly situated must be treated alike. *City of Richmond* v. *Croson*, 109 S.Ct. 706, 712 (1989) (Croson) (O'Conner, J., plurality opinion); *Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 216 (1982). The Due Process Clause of the Fifth Amendment[61] requires that the Federal Government guarantee to its citizens the same equal protection.[62] Pursuant thereto, any governmental distinction among groups or individuals must be justifiable. *Fullilove* v. *Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring); *Cleburne*, 473 U.S. at 470 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring in part and dissenting in part). Equality under the law is denied where, as here, government classifies so

Corp., 4 FCC Rcd 8106 (ALJ 1989) (female); *Rebecca L. Boedker*, 4 FCC Rcd 8328 (ALJ 1989) (white male); *Rem Malloy Broadcasting*, 4 FCC Rcd 8423 (ALJ 1989) (minority); *WCVQ, Inc.*, 4 FCC Rcd 8554 (ALJ 1989) (minority and female); *Albert F. Gary*, FCC 90D-1 (ALJ released Jan. 22, 1990) (white male); *Silver Springs Communications*, FCC 90D-4 (ALJ released Jan. 24, 1990) (minority and female); *Mid-Ohio/Capital Communications, Limited Partnership*, FCC 90D-2 (ALJ released Jan. 24, 1990) (white male). Note that where a winning applicant had minority or female principals without a controlling interest, the applicant was tallied as "white male" hereinabove. Thus, the number of awards to applicants with minority and/or female participation is even greater.

[60] U.S. Const. amend XIV (emphasis added).

[61] The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend V. (Pet. App. 100a).

[62] *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Vance* v. *Bradley*, 440 U.S. 93, 95 n. 1 (1979); *Davis* v. *Passman*, 442 U.S. 228, 234 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 367 n. 43 (1978); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975) (*Wisenfeld*); *Cruz* v. *Hauck*, 404 U.S. 59, 63 n. 10 (1971); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954).

as to distinguish, in rules or programs, between persons who should be regarded as similarly situated.[63]

The Commission's race-based preference gnaws at the heart of the Constitution's equal protection pledge. A "core purpose" of both the Fourteenth and Fifth Amendments, is to "do away with all governmentally imposed discriminations based on race." *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion); *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984). This is because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,"[64] and "are irrelevant to almost every governmental decision."[65] The Commission's preferences for other minority groups similarly offend constitutional principles; the Equal Protection Clause disfavors classifications based upon ethnicity and national origin,[66] as well as race. And, the Commission's female preference policy tests this Court's prior determinations that, because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth,"[67] governmentally imposed gender-based classifications endanger the equal

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[63] TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (1978).

[64] *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978) (*Bakke*) (Powell, J., plurality opinion) (citing *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)).

[65] *Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *Anderson* v. *Martin*, 375 U.S. 399, 402, 404 (1964).

[66] *E.g.*, *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Truax* v. *Raich*, 239 U.S. 33, 41 (1915); *Hernandez* v. *Texas*, 347 U.S. 475 (1954). As the Court stated in *Yick Wo*, the guarantees of equal protection "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." 118 U.S. at 369.

[67] *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., joined by Douglas, J., White, J., and Marshall, J.)

protection guarantees of the Fifth and Fourteenth Amendments.[68]

These concerns are not dispelled because the Commission's race-, ethnic-, and gender-based classifications operate against a group that historically has not been subjected to governmental discrimination. *E.g.*, *Wygant*, 273 U.S. at 267; *Mississippi University for Women*, 458 U.S. at 724 n. 9 (1982); *Bakke*, 438 U.S. at 291, 295; *Casteneda* v. *Partida*, 430 U.S. 482, 499-500 (1977); *id.* at 501 (Marshall, J. concurring). Serious problems of justice are connected with the idea of preference itself;[69] "advancement sanctioned, sponsored or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual."[70] Nor does the fact that the Commission's preferences emanate from the Federal Government, rather than a State, quell concern; the standards of equal protection applicable to the Federal Government under the Fifth Amendment are the same as those applied to state and local governments under the Fourteenth.[71]

Selection of an appropriate equal protection review standard here, however, is problematic. The members of this Court have yet to agree upon the standard of review required for race-based preferences and set-asides, although the Court has acknowledged that race-based re-

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[68] *E.g.*, *Mississippi University for Women*, 458 U.S. at 722; *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464 (1981); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero*, 411 U.S. 677; *Reed* v. *Reed*, 404 U.S. 71 (1971).

[69] *Bakke*, 438 U.S. at 298 (Powell, J. plurality opinion).

[70] *Id.* at 360-361 (Brennan, J., joined by White, J., Marshall, J., and Blackmun, J., concurring in part and dissenting in part).

[71] *E.g.*, *Buckley*, 424 U.S. 93 (per curiam); *Fullilove*, 448 U.S. at 523 n. 1 (Marshall, J. dissenting); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 488 U.S. 522, 543 n. 21 (1987); *Wiesenfeld*, 420 U.S. at 638 n. 2 (1975).

medial action sometimes is permissible. Moreover, this Court's reluctance to enunciate a definitive standard of review for gender-based preference classifications creates special problems herein, where the FCC's gender and minority preferences often compete against one another for broadcast privileges. Application of the prevailing separate standards for minority and gender-based classifications in this case could result in invalidation of one preference policy and proliferation of another, leading only to a shift in preference classifications as new groups attempt to demonstrate their similarity to the "validated" and preferred group. Additionally, prior "affirmative action" cases have analyzed preferential treatment only against purported remedial goals, whereas the Commission's preference classifications have no remedial basis. Finally, although this Court's recent cases have treated preferences and set-asides established by Congress and State or local governments, the Court has not articulated a review standard applicable to classifications instituted and applied by federal agencies. These difficulties may be surmounted, however, by this Court's unanimous adoption of a "strict scrutiny" standard of review for the FCC's racial, ethnic and female preference policies.

A. Strict Scrutiny Should Be Adopted As The Standard Of Equal Protection Review Appropriate For Race-, Ethnic-, And Gender-Based Classifications Which Are Imposed And Administered By The Judiciary Or Federal Administrative Agencies.

This Court has recognized that, although equal protection principles strongly prohibit government-drawn distinctions between individuals or groups solely on the basis of race,[72]

[72] Bakke, 438 U.S. at 291 (Powell, J., joined by White, J., plurality opinion) ("[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting) ("[t]he Equal Protection Clause absolutely prohibits the use of race in many governmental contexts."); *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting) ("any official action that treats a person differently on account of his race or ethnic origin

racial and ethnic classifications sometimes are "relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination"[73] where such discrimination has been identified.[74] Similarly, "in limited circumstances," a gender-based classification favoring one sex can be justified if it "intentionally and directly assists members of the sex that is disproportionately burdened,"[75] and "if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."[76] These limited exceptions to the Constitution's unwavering equal protection guarantees necessarily mean

is inherently suspect and presumptively invalid"); *Cleburne*, 473 U.S. at 471 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring in part and dissenting in part) ("[the] Fourteenth Amendment ... prohibits castes created by law along racial or ethnic lines"); *Croson*, 109 S.Ct. at 734 (Kennedy, J., concurring in part) ("[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause."); *id.* at 73 (Scalia, J., concurring) ("discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society) (quoting A. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

[73] *Wygant*, 267 U.S. at 301 (Marshall, J., dissenting).

[74] *Accord, Croson*, 109 S.Ct. at 720 (O'Conner, J., joined by Rehnquist, C.J., and White, J., plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"); *id.* at 734-735 (Kennedy, J., concurring in part); *id.* at 737 (Scalia, J., concurring); *Wygant*, 476 U.S. at 274 (Powell, J., joined by Rehnquist, C.J., and O'Conner, J., plurality opinion). *But see Croson*, 109 S.Ct. at 730 (Stevens, J., concurring in part) ("I therefore do not agree with the premise ... that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong."); *id.* at 735 (Scalia, J., concurring) ("I do not agree ... that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) to ameliorate the effects of past discrimination.").

[75] *Mississippi University for Women*, 458 U.S. at 728 (1982) (O'Conner, J., joined by Brennan, J., White, J., Marshall, J, and Stevens, J., majority opinion). *See also, Schlesigner* v. *Ballard*, 419 U.S. 498 (1975).

[76] *Mississippi University for Women*, 458 U.S. at 728 (O'Conner, J., joined by Brennan, J., White, J., Marshall, J., and Stevens, J., majority opinion). *See also Califano* v. *Webster*, 430 U.S. 313 (1977).

that innocent parties must share some burdens caused by prior discrimination.[77] However, such "innocent parties" are not required to sacrifice their own constitutional rights to equal protection; the standard of review under the Equal Protection Clause is not dependent on the race or gender of those burdened or benefitted by a particular classification.[78] Unfortunately, however, the Court has not reached firm agreement upon the standard of equal protection review applicable to either minority- or gender-based preference classifications.[79]

The recent decision in *Croson*, 109 S.Ct. 106, marks the first time that a majority of the members of this Court have announced that race- and ethnic-based classifications, whether purportedly remedial or benign, must be subjected to strict judicial scrutiny.[80] To survive strict scrutiny anal-

[77] *E.g.*, *Fullilove*, 448 U.S. at 484 (Burger, C.J., joined by White, J., and Powell, J., plurality opinion).

[78] *Croson*, 109 S.Ct. at 721 (O'Conner, J., plurality opinion); *Wygant*, 476 U.S. at 279-28- (O'Connor, J., concurring); *Fullilove*, 448 U.S. at 515 (Powell, J., concurring); *id.* at n. 13 (Powell, J., concurring) ("the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled."); *Mississippi University for Women*, 458 U.S. at 724 n. 9 (O'Connor, J., joined by Brennan, J., White, J., Marshall, J., and Stevens, J., majority opinion). *See also*, *Califano* v. *Goldfarb*, 430 U.S. 199, 210-212 (1977) (opinion of Brennan, J.); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment"); *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948); A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

[79] *Croson*, 109 S.Ct. at 743 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting) ("Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us.").

[80] *Croson*, 109 S.Ct. at 721 (O'Connor, J., joined by Rehnquist, C.J., and White, J., plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . "); *id.* at 734 (Kennedy,

ysis, (1) a racial or ethnic classification must be justified by a "compelling governmental interest," and (2) the means chosen by the governmental unit to effectuate its purpose must be "narrowly tailored." *Wygant*, 476 U.S. at 274, 285; *Croson*, 109 S.Ct. at 721-722 (quoting *Wiesenfeld*, 420 U.S. at 648 (1975).[81] Whereas, consensus largely has been reached regarding the tests for race- and ethnic- based classifica-

J., concurring in part) ("I accept the less absolute rule . . . that any racial preference must face the most rigorous scrutiny by the courts."); *id.* at 735 (Scalia, J., concurring) ("I agree . . . that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.' "); *id.* at 752 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting) ("Today for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures . . . . This is an unwelcome development.").

[81] A plurality of the Court believe that, whereas, strict scrutiny is warranted where racial classifications are "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism," racial classifications drawn for remedial purposes (1) must serve important governmental objectives, and (2) must be substantially related to achievement of those objectives, in order to withstand constitutional scrutiny. *Croson*, 109 S.Ct. at 743 (Marshall, J., joined by Brennan, J.,and Blackmun, J., dissenting). Justice Stevens employs another approach, couched in "rational basis" terms:

> In my own approach to these cases, I have always asked myself whether I could find a rational basis for the classification at issue. The term "rational basis" . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class . . . . In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a tradition of disfavor by our laws? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications . . .
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> *Id.* at 732 (quoting *Cleburne*, 473 U.S. at 452-453 (1985) (Stevens, J., concurring).

tions, however, this Court has been hesitant to establish a definitive review standard for classifications based upon gender.[82] In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court used strict scrutiny to invalidate a federal statute preventing a military servicewoman from claiming her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits. *Id.* at 682 (Brennan, J., joined by Douglas, J., White, J., and Marshall, J., plurality opinion).[83] However, in subsequent cases, the Court has declined to either apply strict scrutiny review in gender cases or proclaim that strict scrutiny ever applies in such cases, instead applying heightened, or intermediate scrutiny to all gender-based classifications.[84] To survive intermediate scrutiny, the party seeking to uphold a law or policy which classifies individuals on the basis of gender carries the burden of showing an "exceedingly persuasive justification" for the classification.[85] This burden may be met only by showing that (1) the classification serves important governmental objectives, and (2) the discriminatory means employed are substantially related to the achievement of those objectives. *Mississippi University for Women*, 458 U.S. at 724.[86]

The Court should apply identical equal protection review standards to both the minority and female preference policies at issue in the instant case.[87] The rationale for applying

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[82] In *Mississippi University for Women*, 458 U.S. at 724, the Court stated "[b]ecause we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect."

[83] *See also*, *Kahn* v. *Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., joined by Marshall, J., dissenting).

[84] *E.g.*, *Michael M.*, 450 U.S. 464 (1981); *Mississippi University for Women*, 458 U.S. 718 (1982).

[85] *E.g.*, *Mississippi University for Women*, 458 U.S. at 724; *Kirchberg* v. *Feenstra*, 450 U.S. 455, 461 (1981).

[86] This test is the same test as that advocated by the minority in *Croson* for remedial race-based classifications. See note 81, *supra*.

[87] This will not be difficult for a minority of this Court who apply the same two-pronged equal protection test to gender-based preferences and race-based remedial measures. *See* note 86, *supra*. However, even those Justices apparently would apply a stricter standard to the Commission's policies upon a determination that the policies are not remedial in nature. *Id.* In that event, the stricter standard should be applied to both classifications for the reasons stated herein.

an intermediate review standard to gender-based classifications, that "the sexes are not similarly situated in certain circumstances,"[88] is wholly absent herein. Although the Equal Protection Clause does not "require things which are different in fact . . . to be treated in law as though they were the same,"[89] it clearly requires such treatment for those similarly situated, which applicants for FCC broadcast licenses are. Thus, a determination that strict scrutiny review applies to gender-based classifications which appear facially unrelated to inherent differences among the sexes would bridge, rather than undermine this Court's prior precedents.

Second, rationales frequently used to justify intermediate level scrutiny for gender-based classifications are fallacious when applied to this case. For example, Justice Powell, in *Bakke*, attempted to justify the separate standards in dicta, saying "[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria . . . [t]here are no rival groups which can claim that they too are entitled to preferential treatment." *Bakke*, 438 U.S. at 303. However, this is not true here, where females, and other classified minorities must compete for FCC preferences;[90]

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[88] *E.g.*, *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (Stewart, J., plurality opinion); *Califano* v. *Webster*, 430 U.S. 313 (1977); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). As the Court has stated, a legislature may "provide for the special problems of women." *Wiesenfeld*, 420 U.S. at 653 (1975).

[89] *E.g.*, *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

[90] In fact, comparative licensing cases often come down to an unseemly squabble pitting females against minorities, *see, e.g.*, *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, 99 FCC 2d 781, 804-805 (Rev. Bd. 1984)(subsequent history omitted), or one racial minority against another minority, *e.g.*, *Religious Broadcasting Network*, 3 FCC Rcd 4085

it can only be true where the classifications are based upon factual distinctions between male and female biology and makeup.

Third, the failure of this Court to invoke a uniform standard of equal protection review prior to commencing review under the intermediate standard[91] could result in a scenario in which the female preference is upheld and the minority preferences are not. As Justice Powell observed with respect to minority enhancements in *Bakke*, "the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular . . . minority are intractable . . . [t]hose whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups." 438 U.S. at 265. This would be the result of a disposition of this case in which females remain preferred but minorities do not.[92] Accordingly, this Court should apply strict scrutiny review to both classifications.

This Court also should adopt strict scrutiny as the standard applicable to federal administrative agencies and the judiciary.[93] Deferential review already has been extended to

(Rev. Bd. 1988)(Black and Hispanic applicants decry preference for Asians seeking New Jersey TV license); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 844-845 (Rev. Bd. 1981)(applicant seeks higher preference for Black ownership than for Hispanic ownership). The Commission even had one case in which a party claimed a preference for "sexual orientation." *Ronald Sorenson*, 4 FCC Rcd 6961 (ALJ 2989).

[91] As has been the preferred course for this Court in the wake of *Stanton* v. *Stanton*, 421 U.S. 7, 13 (1975).

[92] *See* note 90, *supra*.

[93] This Court's recent affirmative action cases do not set forth the equal protection standards applicable to the federal judiciary (which established the FCC's preference classifications), or federal administrative agencies. *Fullilove* examined racial classifications imposed by Congress, discussing the standard of equal protection review applicable to congressional race-based remedial measures enforced against the States, and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472-92

certain Acts of Congress, pursuant to its unique Fourteenth Amendment powers.[94] The application of strict scrutiny to State and local classifications also is premised upon the Fourteenth Amendment. The failure to apply at least heightened review to policies promulgated by courts and federal agencies would rob the Due Process Clause of the Fifth Amendment, which restrains federal equal protection violations, of any substantive meaning. Regardless of which test is applied, however, the Commission's minority and female preference policies cannot pass constitutional muster.

B. The Commission's Minority And Female Preference Policies Cannot Survive Strict Scrutiny, Or Any Less Stringent Standard Of Equal Protection Review.

The disparities between the strict scrutiny equal protection test applied by the Croson majority to race- and ethnic-based classifications, and the tests applied by Justices Brennan, Marshall and Blackmun, in the case of race-based remedial measures, and additional members of the Court, with respect to gender-based classifications, do not preclude a fair measure of consensus.[95] As Justice O'Connor has noted, "as regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one." *Wygant*, 476 U.S. at 286. Moreover, although the "narrow tailoring" required by strict scrutiny analysis undoubtedly is more stringent than the requirement that classifications be "substantially related" to the achievement of their purposes, the lack of any nexus between objective and remedy within the Com-

(Burger, C.J., writing for the plurality). *Wygant*, and the more recent *Croson*, shed light on the disposition of cases in which race-based remedies are imposed by a state or local government without evidence of identified past discrimination, and enunciate criteria for properly tailoring race-based remedies where evidence of such identified discrimination is present. *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040, 3064 (1989) (Scalia, J., concurring in part).

[94] *Fullilove*, 448 U.S. 448. *See* discussion, *infra* at pp. 47, 49.

[95] *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring).

mission's preference scheme subverts any conclusion that the FCC's policies have even a rational basis. Accordingly, the Commission's preferences are hard-pressed for support under any of the considerations normally deemed relevant under the Fifth and Fourteenth Amendments.

1. The FCC's Race-, Ethnic- and Gender-Based Preference Classifications Do Not Further A Compelling Or Important Governmental Interest.

The Federal Government has a compelling or important interest in remedying past discrimination and its lingering effects. *E.g.*, *Wygant* 476 U.S. at 286; *Mississippi University for Women*, 458 U.S. at 728. Several members of the Court hold that *only* remedial purposes justify the use of race- and ethnic-based preference classifications.[96] Additionally, although its application remains untested, the Court has suggested that a state interest in the promotion of racial diversity is sufficiently compelling to support use of racial considerations within the context of higher education. *Bakke*, 438 U.S. at 311-15; *Wygant*, 476 U.S. at 286. And, Justice O'Connor offerred in *Wygant* that additional interests might be accepted:

> [N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies. *Id.*

The FCC's program diversity rationale, however, should not be so sanctioned by this Court.

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[96] *See* discussion at note 74, *supra*. Justice Stevens, however, would permit non-remedial race-based classifications under certain circumstances, whereas Justice Scalia disfavors all classifications based on race, regardless of benign or remedial purpose. *Id.*

a. Program Diversity Is Not A Compelling Or Important Governmental Interest So As To Justify The Commission's Preference Classifications.

The sole stated purpose of the Commission's minority and female preference scheme is to foster diverse broadcast programming, a goal said to be premised upon the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 614 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (quoting *1965 Policy Statement*, 1 FCC 2d at 394 n. 4). The preferences were designed to "enhance program diversity by increasing ownership of stations by significant groups that are substantially underrepresented . . . ." *FCC Brief in Winter Park* at 47 (quoted in *Winter Park*, 873 F.2d at 357 (Williams, J., dissenting). (Pet. App. 19a). The Commission has emphasized that its pursuit of "program diversity," is the underpinning of the classifications here attacked, rather than any remedial rationale.[97]

Program diversity would not appear to be an important or compelling governmental interest so as to justify distinctions which are repugnant to established equal protection principles. The concept itself is amorphous, undefined even by its proponent. As Judge Williams pointed out, "[n]o party here has offered a definition of minority programming that is empirically verifiable . . . ." 873 F.2d at 358. (Pet. App. 22a). Ergo, the lack of a clear definition of program diversity hampers any conclusion that its accomplishment is "important" or "compelling."

To the extent that program diversity is definable, the acknowledged non-remedial nature of the goal directly re-

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[97] *See Winter Park*, 873 F.2d at 356 (Pet. App. 17a-18a); *FCC Brief in Winter Park* at 30 ("The FCC's goal in implementing the preference policy, however, has not been to remedy prior discrimination against minorities or to provide remedial benefits."); *FCC Steele Brief* at 18 (S.J.A. 81) ("There has never been a finding, nor so far as we know even an allegation, that the FCC engaged in prior discrimination against racial minorities or women in its licensing process.") (S.J.A. 81).

sults in stigmatic harm to the groups which "benefit."[98] As the origins of the concept reveal, program diversity is tantamount to organized, governmental stereotyping. The rationale is premised on the idea, first presented in *TV 9*, 495 F.2d at 938, and *Garrett*, 513 F.2d at 1063, that diversity of station ownership will bring about diversity of programming. *See Winter Park*, 873 F.2d at 363 (Williams, J., dissenting) (Pet. App. 32a-33a). The underlying assumption is the "reasonable expectation" that minority or female owners will program their new broadcast stations in some sort of minority or female manner.[99] Under the Commission's theory, race, ethnicity and gender not only determine what type of programming station owners want to provide, but also what viewers and listeners want to hear. *Winter Park*, 873 F.2d at 358 (Pet. App. 21a). Such "stereotypical analysis . . . is the hallmark of violations of the Equal Protection Clause." *Croson*, 109 S.Ct. at 732 (Stevens, J., concurring in part). Justice Powell warned in *Bakke*, that "[p]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." 438 U.S. at 298. The Commission's preferences, based entirely on what are deemed predictable traits inherent in minority and female personalities, render this concern paramount.[100] The perpetuation of stereotypes in the name of program diversity cannot be a compelling or important governmental interest.

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[98] *See Croson*, 109 S.Ct. at 721 (O'Connor, J., plurality opinion) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.")

[99] *TV 9*, 495 F.2d at 938 ("Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors.").

[100] Other members of this Court have expressed similar concerns. *See Croson*, 109 S.Ct. at 745 (Marshall, J., joined by Brennan, J. and Blackmun, J., dissenting) ("we have required that government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere 'paternalistic stereotyping,' not on a careful consideration of modern social conditions.").

Further, program diversity would not appear a compelling or important governmental interest because the government neither can ensure nor enhance it: the marketplace does that. And, the marketplace apparently is working. The Commission itself concluded in *Deregulation of Radio*,[101] that "all types of minority needs, be they racial, ethnic or taste, can be and indeed are being well met through increasing the number of stations." *Id.* at 1068. Currently, there are a "significant number of over-the-air television and radio voices [which] insure the presentation of diverse opinions on issues of public importance." *Fairness Doctrine*, 102 FCC 2d 143, 202, 208 (1985). As the Commission has explained:

> [L]icensees have come to the conclusion that, even where the group appealed to has traditionally had a low income or is low in number, market-place forces make the provision of radio service to these segments of the community a rational economic decision. *Id.*

The FCC reached similar conclusions in *Commercial TV Stations*, 98 FCC 2d 1076 (1984), *reconsideration denied*, 104 FCC 2d 357 (1986), *aff'd*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, even were program diversity a valid governmental interest, it could not be "important" or "compelling" because the entity advancing the interest believes it already has been, and is being, achieved.

b. The Bakke Diversity Rationale Should Not Be Extended Beyond The Academic Context.

The FCC's adoption of the program diversity rationale to support its preference classifications has resulted in speculation regarding possible connections between the Commission's minority and female ownership promotion policies and the idea, first advanced in *Bakke*, that the pursuit of academic diversity is a compelling governmental interest.

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[101] 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd in part and rev'd in part*, *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

The lower court, basing its constitutional determination almost entirely upon its earlier holding in *West Michigan*, 735 F.2d 601,[102] did not undertake an independent review of the program diversity goal. Instead, the *Winter Park* majority relied upon *West Michigan*'s conclusion that because consideration of minority status was but "one factor in a competitive multi-factor selection system designed to obtain a diverse mix of broadcasters," 735 F.2d at 613, the policies were validated under Justice Powell's hypothetical use of race as a factor in educational admissions for the purpose of obtaining diverse student bodies. *Winter Park*, 873 F.2d at 356 (Pet. App. 17a-18a). Both the *West Michigan* and *Winter Park* courts treated the FCC's diversity goal as virtually identical to the objective embraced by Justice Powell in *Bakke*.

The program diversity rationale embraced by the Commission and the academic diversity objective outlined by Justice Powell in *Bakke* would not appear interchangeable. The differing contexts from which the two goals arise would seem to render meaningful comparison impossible. For example, Justice Powell found academic diversity tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create a diverse student body is important for exposing students to the "atmosphere of 'speculation, experiment and creation'. . . essential to the quality of higher education." *Id.* at 323. This goal would not seem to have a counterpart in the Commission's race-, ethnic- and gender-based preference policies.

A second flaw in comparing the FCC's preference awards with the multi-factored selection system theoretically approved in *Bakke* for university admissions is that the FCC preference factors, unlike those encouraged by Justice Powell, are dispositive of the outcome in most comparative cases.[103]

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[102] *Winter Park*, 873 F.2d at 349 (Pet. App. 2a) (Edwards, J., majority opinion) ("[t]his case is clearly controlled by *West Michigan*.").

[103] *See* discussion *supra*, at pp. 21-25.

A significant distinction between the academic diversity rationale and the Commission's program diversity goal is that pursuit of academic diversity in the manner advocated by Justice Powell breaks down racial stereotypes, whereas the Commission's pursuit of program diversity through minority and female ownership promotion fosters them. As Judge Williams noted, "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device against ethnic stereotyping." 873 F.2d at 357. (Pet. App. 21a). By contrast, the Commission's policies not only promote stereotypes, but also *segregation*; the preferences assume greater weight under the best practicable service criterion as minority or female participation in applicants increases. The policies thus encourage minority or female applicants to join forces, lest non-minority principals weaken their comparative standings. The result is like a segregation of the airwaves in which discrete groups of minority broadcasters are prompted to cling together to broadcast the type of programming expected by the Commission.

Numerous contrasts render acceptance of the Commission's preference classifications under the *Bakke* diversity rationale difficult, if not impossible. The extension of this rationale to broadcasting would wreak havoc on affirmative action programs which this Court and others have recognized as valid, as various minority groups clamor for preferences based upon arguments that one group or another has as muchor more impact upon diversity as the group to whom preferential treatment is afforded.

2. The Commission's Preference Policies Are Not Sufficiently Tailored To The Accomplishment Of Program Diversity To Pass Constitutional Muster.

Assuming, *arguendo*, that the Commission's program diversity goal is a compelling or important governmental interest, the strict scrutiny standard to which a majority of this Court adheres requires that the means chosen be "nar-

rowly tailored" to accomplishment of the goal. *Wygant*, 476 U.S. at 274.[104] Application of this prong of strict or heightened scrutiny to the Commission's preferences leads to the conclusion that the Commission's minority and female ownership promotion policies are not rationally-related, much less narrowly tailored, to the fulfillment of its program diversity goal. Neither do they work, nor do they have any stopping point.

The burden is on the Commission to prove that its preference policies are the "most exact" means to the end of program diversity. *E.g., Bakke*, 438 U.S. at 320. Thus, the Commission's preferences must fail, not only if their rationale is demonstrably false, but also if it is not demonstrably true.[105] The burden also is on the Commission to sustain its gender preference with an "exceedingly persuasive" justification. *Mississippi University for Women*, 458 U.S. at 724; *Kirchberg*, 450 U.S. at 461.

The FCC has not satisfied this burden. First, the Commission has declared that program diversity already exists or is assured by the marketplace. Thus, an indirect attempt to promote such diversity through ownership preferences would appear unnecessary for, or unrelated to, its accomplishment. Second, the Commission's concession that no record demonstrates that use of "a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving that objective," *FCC Steele Brief* at 19. (S.J.A. 81), renders inconceivable the notion that the policies are narrowly tailored; indeed they are without rational basis. Third, the Commission has admitted it has no evidence "on which to base an assumption that a nexus exists between an owner's race or gender and pro-

[104] The heightened scrutiny applied to gender-based classifications and the "strict scrutiny" formula of Justices Marshall, Brennan and Blackmun require that any classifications used be "substantially related" to the achievement of the proffered governmental objective.

[105] *E.g., United States* v. *Paradise*, 480 U.S. 149 (1987) (Stevens, J., concurring) ("the governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them.").

gram diversity." *FCC Steele Brief* at 19. (S.J.A. 81). This destroys any claim of narrow tailoring; the Commission is uncertain even of the logic underlying its preference awards. Fourth, "[t]he biggest hurdle to minority ownership is securing the financing . . . ." *St. Louis City Communications, Inc.*, 4 FCC Rcd 5262 (1989). This barrier cannot be overcome by the award of preferences.[106] Fifth, even assuming that the Commission's stereotypes regarding minority and female programming proclivities are true, it is questionable whether program diversity is promoted by the rote application of preference awards for minority and female ownership wherever new frequencies are opened to application; absent analysis of the individual community and its need for a certain type of voice,[107] the Commission's policies might result in heavy concentrations of identical perspectives in a small region, rather than in nation-wide, or even local diversity. Finally, the FCC's preferential treatment policies cannot be narrowly tailored because there is no evidence that the FCC has considered race-neutral means to foster its program diversity objective. *See Croson*, 109 S.Ct. at 728 (O'Connor, J., joined by Rehnquist, C.J., White, J., Stevens, J. and Kennedy, J., majority opinion).

Whatever narrow tailoring *was* present despite these flaws has been destroyed by other policies which undercut

[106] The Commission has indicated its concern relative to minority financing. *See Minority Ownership of Broadcast Facilities*, 69 FCC 2d 1591 (1978). It has not, however, adopted lower financial qualifications standards for minority applicants. *See e.g. Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n. 5 (Rev. Bd. 1982).

[107] Prior to *TV 9*, the Commission seems to have operated very successfully in much this way. *See e.g., La Fiesta Broadcasting Co.*, 6 FCC 2d 65, 67 (Rev. Bd. 1966) (awarding license to applicant who proposed only Spanish-language broadcasting for Lubbock, Texas area). Pursuant to its earlier race-neutral policy, the FCC allowed an applicant to show that its proposed programming addressed the special needs of minorities in the relevant area. *See Salter Broadcasting Co.*, 8 FCC 2d 1036, 1039-1040 (Rev. Bd. 1967). Non-minority applicants were permitted to make such a showing. *See Herbert Muschel*, 33 FCC 37 (1962). The overall policy was more sensitive both to minority broadcasting interests and to the individual qualities of non-minority applicants than the stark, ethnic- and gender-based preferences the Commission now employs.

the FCC's most basic assumption: that awarding a broadcast license to a minority- or female-controlled applicant results in minority or female ownership. As discussed *supra* at p. 22, the limited partnership device and other passive ownership structures shield certain principals from comparative consideration, even where they are financially responsible for the applicant and proposed station. Accordingly, what appears an award to a minority or female in a comparative proceeding may actually be an award to a "limited partnership" comprised of 100 white males with one minority or female "general partner." It is doubtful that under such circumstances the minority or female will have discretion over programming decisions. Moreover, the Commission's rules permit applicants to sell construction permits immediately upon prevailing in a comparative proceeding, provided station operations have not yet commenced. *James U. Steele*, 4 FCC Rcd at 4704 n. 1. Once an award is made there is no assurance that the minority or female chosen will retain the permit, rather than sell to a non-minority group member, or a male.

The Commission's race-, ethnic- and gender-based preference classifications are loosely-fitted, at best, to the objective of program diversity. Consequently, they violate the equal protection principles embodied in the Due Process Clause of the Fifth Amendment.

3. *Fullilove* Does Not Allay The Necessity Of Reaching Constitutional Determination On This Issue.

Neither *Winter Park* nor *West Michigan* undertook a complete review of the Commission's minority and female preference policies under the equal protection principles set forth hereinabove. Apparently, the reason for this was their conclusion, based upon *Fullilove*, that "any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 355. (Pet. App. 15a). For the *West Michigan* court, this "approval" was Congress'

passage of § 115 of the *Communications Amendments Act of 1982*,[108] designed to facilitate the development of a lottery as an alternative to the Commission's comparative process. The legislation required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission. *Id.* The *Winter Park* majority found additional acquiescence in the *1988* and *1989 Appropriations Acts*. *Winter Park*, 873 F.2d at 355. (Pet. App. 14a). However, the *Winter Park* majority did not analyze the legislation, deferring instead to the *West Michigan* panel's statement that, "Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure." *Winter Park*, 873 F.2d at 353 (quoting *West Michigan*, 735 F.2d at 614).

Metro disputes *West Michigan*'s notion that by enacting the 1982 lottery legislation, Congress transmogrified the FCC's race-, ethnic- and gender-based preference scheme into a valid race-based remedial measure. At best, the *West Michigan* court's speculation in this regard was an educated guess; more accurate, perhaps, is Judge Williams' conclusion that "[t]he portion of *West Michigan* addressing remedial concerns is . . . dictum." 873 F.2d at 365 (Pet. App. 38a). The FCC has tendered no remedial rationale for its policies and the courts cannot uphold a Commission action on the basis of reasoning which it has not adopted. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Even if the 1982 lottery legislation is an indicia of congressional intent to employ remedial measures in the broadcast industry,[109] the necessity for equal protection analysis remains. This Court has held that "the mere recitation

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[108] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (codified at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (Pet. App. 102a).

[109] Congress based its lottery preference requirements on findings of "underrepresentation" in the broadcast media, which it characterized as resulting from "the effects of past inequities stemming from racial and ethnic discrimination." *West Michigan*, 735 F.2d at 614 (quoting H.R. REP. NO. 97-765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2287).

of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Croson*, 109 S.Ct. at 722 (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J, plurality opinion) (quoting *Wiesenfeld*, 420 U.S. at 648). "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 721. Both the factual basis for enactment of the classification and the nexus between its scope and the basis should be examined. *Id.* In the case of the lottery legislation, such analysis is crucial to any determination that (1) Congress intended for the FCC to apply race- and ethnic-based remedial measures in its comparative hearing context, or that (2) Congress identified past discrimination with sufficient particularity to justify the imposition of race- and ethnic-based classifications. *West Michigan*'s reliance on findings of "underrepresentation," without more, to justify the Commission's adoption of constitutionally disfavored classifications, thus was premature.[110]

No evidence indicates that Congress intended its 1982 lottery legislation to receive substantive application in the comparative hearing context. Thus, the FCC's expansion of its court-ordered comparative preferences for *black* ownership and participation to other minority groups listed in the lottery statute,[111] must be perceived as an independent act of the Commission, warranting review under the standard applicable to federal administrative agencies, which, as Metro has noted, should be strict scrutiny.

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[110] *See Croson*, 109 S.Ct. at 724-725 (O'Connor, J., plurality opinion) ("[t]he district court . . . relied on the highly conclusionary statement . . . that there was racial discrimination in the construction industry . . . [t]hese statements are of little probative value . . . when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.").

[111] *See* discussion at note 18, *supra*..

Moreover, no evidence suggests that Congress' remarks regarding "underrepresentation" of certain minorities was tantamount to "findings" of past discrimination in the broadcasting industry.[112] At best, Congress was referring to generalized societal discrimination. And, whereas, Congress "may" be able to "identify and redress the effects of society-wide discrimination,"[113] that does not mean other governmental bodies may do so.[114] "Underrepresentation" is not a sufficient basis for remedial action, especially here, where special qualifications are required to obtain a broadcast license. "When special qualifications are required . . . comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Croson 109 S.Ct. at 725; *Hazelwood School District*, 433 U.S. at 307-308.[115] A governmental body other than Congress must have a "firm basis" for believing that remedial action is required. *Wygant*, 476 U.S. at 266 (O'Connor, J., concurring). That no such basis was before the Commission is evidenced by its consistent refusal to claim any purpose other than program diversity for its preferences.

Even if congressional findings of past discrimination in the broadcast industry were present (which they are not), the Commission, like the City of Richmond, would not have plenary authority to rely upon those findings for the construction of its own remedial program unless the evidence pointed to its own prior discrimination, which it then seeks

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[112] *See Winter Park*, 873 F.2d 365 (Williams, J., dissenting) ("[n]either Congress nor the FCC ever found any evidence to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry.").

[113] *Croson* 109 S.Ct at 719 (O'Connor, J., plurality opinion).

[114] *See Fullilove*, 448 U.S. at 483 (Burger, C.J., plurality opinion) ("in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equl protection guarantees.").

[115] *See also Mayor* v. *Educational Equality League*, 415 U.S. 605, 620 (1974).

to eradicate. *Id.* at 722; *Bakke*, 438 U.S. at 307. "For the governmental interest in remedying past discrimination to be triggered, 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made. Only then does the Government have a compelling interest in favoring one race over another." *Croson*, 109 S.Ct. at 723; *Bakke*, 438 U.S. at 308-309.

The 1982 lottery legislation, therefore, could not justify the Commission's preference scheme and provides no support for subjecting FCC policies to a more deferential standard of review. Moreover, regardless of the Court's determination in this regard, strict scrutiny analysis must be applied to the *FCC's* gender-based preference classifications (women were not listed as a minority group in the lottery statute) and its preference for black ownership and participation, established by the *courts*. The deferential standard of review sometimes afforded *Congress* under *Fullilove* provides no justification for overlooking infirmities inherent in the *Commission*'s preference policies and in court-ordered remedial mandates based on inadequate findings.

II. Congress' *1988, 1989* And *1990 Appropriations Acts* Exceeded Its Authority Under Section 5 Of The Fourteenth Amendment And Violated The Equal Protection Principles Embodied In The Due Process Clause Of The Fifth Amendment To The Constitution.

The provisions of the *1988 Appropriations Act*,[116] which, *inter alia*, entrenched the FCC's minority and female preferences in the midst of legal challenges thereto, and dictated the results reached in the instant case,[117] have been

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[116] *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987).

[117] *See* S. Rep. No. 100-182, 100th Cong., 1st Sess. (1987) (S.J.A. 55) ("[t]he Committee also instructs the Commission to resolve, within 60 days all proceedings that have been remanded by the court of appeals, including . . . *Winter Park Communications* v. *Federal Communications Commission* . . . in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership.").

renewed by Congress each subsequent fiscal year.[118] The lower court, noting that Congress "has interceded at least twice to endorse the FCC's policy of awarding enhancements for minority ownership," apparently felt that the enactments were valid exercises of Congress' remedial powers under § 5 of the Fourteenth Amendment, although the issue was not discussed in detail. *Winter Park*, 873 F.2d at 354 (Pet. App. 14a-15a). However, this Court's subsequent decision in *Croson*, undermines the lower court's conclusion.

Pursuant to *Croson*, the Fourteenth Amendment's § 5 conferral of power upon Congress to enact *remedial* legislation is an explicit constraint upon the power of *States*. 109 S.Ct. at 710. Accordingly, the Fourteenth Amendment is inapplicable. Congress' action with regard to the FCC, a *federal agency*, is unrelated to its power to curtail *State* discrimination. Nor are the *Appropriations Acts* remedial. The legislative histories of the Acts reveal "program diversity," rather than amelioration of prior discrimination to be Congress' goal.[119] Because no remedial purpose is involved in the relentless pursuit of program diversity, the *Appropriations Acts* appear to be the result of a "congressional desire to prefer one racial or ethnic [or gender] group over another," in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Fullilove*, 448 U.S. at 497 (Powell, J., concurring).

Whereas, the enactements are buried in appropriations measures, rather than constituting a "considered decision of Congress and the President," *Fullilove*, 448 U.S. at 473, strict scrutiny equal protection review is appropriate. Although appropriations measures are "Acts of Congress,"

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[118] *See Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 (1988); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989).

[119] *See* discussion in *Winter Park*, 873 F.2d at 363-65 (Williams, J., dissenting).

they "have the limited and specific purpose of providing funds for authorized programs." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978). "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful, and not for any purpose forbidden." *Id.* If this assumption is not protected, it would lead to the "absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation." *Id.* Such a burden would have been particularly onorous with respect to the *1988 Appropriations Act*, in which legislators had only three hours to review its 43 pounds and 3,286 pages of documentation. *President's State of the Union Address*, 24 WEEKLY COMP. PRES. DOC. 87 (Jan. 25, 1988).

Neither Congress nor a State can validate a law that denies the rights of equal protection. *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977); *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968). And, a statute apparently governing a dispute "cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution." *Marbury* v. *Madison*, 2 L.Ed 60 (1803); *Younger* v. *Harris*, 401 U.S. 37 (1971).

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed, the Commission's minority and female preference policies declared unconstitutional, and the construction permit for Channel 65 at Orlando, Florida awarded to Metro.

Respectfully submitted,

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APPENDIX

APPENDIX TO BRIEF

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act*, 1990, Public Law 101-162, 103 Stat. 988 (1989):

> For necessary expenses of the Federal Communications Commission . . . *Provided*, That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, of to continue a reexamination of, the policies of the Federal Communications Commission with respect of comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and *Mid-Florida Television Corp.*, 60 F.C.C. 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .

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MAR 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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QUESTION PRESENTED

Whether the statutory requirement for the Federal Communications Commission to award a qualitative enhancement for minority ownership in comparative licensing proceedings violates the equal protection component of the fifth amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 873 F.2d 347. The orders of the court of appeals denying the petition for rehearing and suggestion of rehearing en banc (Pet. App. 96a, 98a) are not reported. The memorandum opinion and order of the Federal Communications Commission granting the license application to petitioner's competitor, Rainbow Broadcasting Co. (Pet. App. 60a-63a), is not reported. The memorandum opinions and orders of the Federal Communications Commission on remand from the court of appeals (Pet. App. 48a-51a, 52a-57a) are reported at 3 FCC Rcd 866 and 2 FCC Rcd 1474, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 94a) was entered on April 21, 1989. The orders of the court of appeals denying rehearing and rehearing *en banc*

were entered on June 21, 1989. The petition for a writ of certiorari was filed on September 18, 1989. The petition was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Constitution of the United States, the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, and other statutes are set forth at Pet. App. 161a-164a.

STATEMENT

A. Background

1. *The Comparative Licensing Process*

In the Communications Act of 1934, Congress assigned to the Federal Communications Commission exclusive authority to grant licenses, based on the "public interest, convenience, and necessity," to construct and operate radio and television broadcast stations in the United States. *See* 47 U.S.C. 151, 301, 303, 307, 309. When the FCC compares mutually exclusive applications for new radio or television broadcast stations, it looks at two principal factors: diversification of control of the media of mass communications and the best practicable service to the public. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter *1965 Policy Statement*). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984). In assessing which applicant will provide the best practicable service to the public, the Commission considers a variety of factors including proposed participation in day-to-day station management by owners (commonly referred to as the "integration" of ownership and management), the applicants' past broadcast records, and efficient use of the frequency. *1965 Policy Statement*, 1 F.C.C.2d at 397-99. Integration of ownership and management is a factor of "substantial importance" in determining which applicant is superior under the best practicable service objective. *Id.* at 395. This factor has a "quantitative" aspect, i.e., the degree to which the

owner or owners will be involved in the station's management. It also has "qualitative" aspects. Among the attributes viewed by the Commission as qualitatively enhancing an integration proposal, and which may be of decisional significance when there are no appreciable quantitative differences, are the local residence, civic participation, past broadcast experience, race and gender of the owner. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604-07 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

2. *Development of Minority Ownership Policies*

a. *Credit for Minority Ownership in Comparative Licensing Proceedings*

The issue of minority ownership as a factor in the comparative evaluation of broadcast applicants was not specifically addressed in the *1965 Policy Statement*. The Commission did emphasize in that policy statement, however, its more general, and longstanding, efforts to increase diversity in radio and television programming by increasing diversity of ownership of broadcast stations.[1] The Commission explained that it has been committed to the concept of diversity of control of broadcast stations because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *1965 Policy Statement*, 1 F.C.C.2d at 394.

In the late 1960s, following the adoption of the Civil Rights Act of 1964 and the *Report of the National Advisory Commission on Civil Disorders* (1968) (hereafter *Kerner Commission Report*), the Commission began to focus its diversity-related concerns on the very small participation by minorities in the broadcasting industry. The Commission acted first in the area of employment by

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[1] *1965 Policy Statement*, 1 F.C.C.2d at 394; *see also FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Storer Broadcasting Co. v. United States*, 220 F.2d 204, 209 (D.C. Cir. 1955), *rev'd on other grounds*, 351 U.S. 192 (1956).

adopting regulations that sought to ensure that broadcast licensees did not discriminate against minorities in their employment practices. *See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).[2]

The Commission stated that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968). The Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

The Commission also sought to enhance broadcast program diversity by requiring station owners to "ascertain" the needs, interests and problems of substantial segments of their communities, specifically including "minority and ethnic groups" and to direct their non-entertainment programming to those ascertained needs. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419, 442 (1976).

These initial steps to improve minority participation in broadcasting did not involve the consideration of race as a factor in licensing decisions. On the contrary, the Commission refused to give credit to an applicant in a comparative licensing proceeding solely on account of the race of its owners, where the record did not give assurance that the owner's race would be likely to affect the

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[2] *See also Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C. 2d 354 (1975); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

quality of the station's broadcast service to the public. *See Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17-18 (Rev.Bd.), *rev. denied*, 37 F.C.C.2d 559 (1972), *rev'd*, *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

The court of appeals, however, rejected the Commission's position that the circumstances must give an "advance assurance of superior community service attributable to such Black ownership and participation . . . ." *TV 9, Inc. v. FCC*, 495 F.2d at 938. "Reasonable expectation," the court held, "not advance demonstration, is a basis for merit to be accorded relevant factors." *Ibid.* The court explained:

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . We hold only that when minority ownership is likely to increase diversity of content, especially on opinion and viewpoint, merit should be awarded.

Id. at 937-38.

Two years later the court emphasized that "[t]he entire thrust of *TV 9, Inc.* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation' without 'advance demonstration,' gives them relevance." *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C.Cir. 1975) (footnotes omitted). *See also West Michigan Broadcasting Co. v. FCC*, 735 F.2d at 610-11.

Following the decisions of the court of appeals in *TV 9, Inc.* and *Garrett*, the Commission announced that minority ownership and participation would be considered a "plus factor" in a comparative hearing in determining which among competing license applications to grant. *See WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978). This "plus factor" is weighed together with all other relevant

factors and is awarded only to the extent that a minority owner will actively participate in the day-to-day management of the station. *See TV 9, Inc.*, 495 F.2d at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-12. The minority enhancement credit subsequently was extended to applicants that proposed to include female owners who would be involved in the station's operations. *See Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev.Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981); *Horne Industries*, 94 F.C.C.2d 815, 822-24 (Rev.Bd. 1983), *rev. denied*, 56 Radio Reg.2d (P&F) 665, 668 (1984).[3]

b. *Other Minority Ownership Policies*

In 1978 a task force formed by the FCC to examine the issue of minority ownership of radio and television broadcast stations issued a report finding that "the minority community continues to be underrepresented among broadcast station owners" and that this situation was "a direct result" of past society-wide discrimination. FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* Summary at 1; 7 (1978) (hereafter *Minority Task Force Report*). The task force found that significant barriers, including lack of information, lack of adequate financing and inexperience in the industry, had hampered the growth of minority ownership. *Id.* at 8-29. The task force recommended that further steps should be taken by the FCC to encourage and facilitate the entry of more minorities into ownership of broadcast stations. *Id.* at 1, 8, 30.

The FCC reviewed the findings of the *Minority Task Force Report* and concluded that there was a need for further action to address the " '[a]cute underrepresentation of minorities among the owners of broadcast properties . . . .' " *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (hereafter *1978 Minority Policy Statement*) (Pet. App. 130a), *quoting Minority Task Force Report* at 1. The Commission found that its initial steps involving employment and ascertainment had not been sufficient. The Commission noted, referring to the findings of the task force, that fewer than one per cent of the 8500 commercial radio and television stations operating in 1978 were controlled by minorities, although minorities constituted 20 percent of the population. *See 1978 Minority Policy Statement*, 68 F.C.C.2d at 981, *citing, Minority Task Force Report* at 1.[4] The Commission found that although "the broadcasting industry has on the whole responded positively" to previous FCC initiatives, "the views of racial minorities continue to be inadequately represented in the broadcast media." *1978 Minority Policy Statement*, 68 F.C.C.2d at 980 (footnotes omitted).

Concluding that "additional measures are necessary and appropriate," *1978 Minority Policy Statement*, 68

[3] Contrary to petitioner's apparent view, the FCC's policy of providing credit for female ownership is not an issue in this case. The FCC held that the minimal enhancement credit received by Rainbow Broadcasting Co. for its female ownership was not determinative (Pet. App. 49a-50a n.1; 61a), and the court of appeals expressly declined to consider the legality of the gender preference. *See id.* at 10a n.5; Amicus Br. for U.S. at 5 n.5.

[4] *See also* United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 280 (1971) ("[O]f the approximate[ly] 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."), *cited in TV 9, Inc.*, 495 F.2d at 937 n.28; *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (1971) ("According to the uncontested testimony of petitioners, no more than a dozen of [the] 7,500 broadcast licenses issued are owned by racial minorities."); *Mid-Florida Television Corp.*, 37 F.C.C.2d at 563 (Commissioner Hooks, concurring) ("While there is still no black ownership of a television station, I am told that black ownership of radio stations may be approaching the astronomical figure of 20 out of nearly 7,000."); United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort—1974* 49 (1974) ("In 1973, there were over 7,000 radio stations and 1,000 television stations operating in the United States. Of these, only 33 radio stations located in 20 states and the District of Columbia and no television stations were owned by minority group members.").

F.C.C.2d at 981, the Commission adopted additional policies to encourage greater minority ownership of broadcast stations.[5] Those policies, like the minority enhancement credit in comparative licensing proceedings, were based on the Commission's belief that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . . " and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Ibid.* The Commission emphasized that lack of minority representation among owners of broadcast stations "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" (*ibid.*), by serving "the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation . . . ." *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1265 (1982), *aff'd, West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

3. *Congressional Action*

Congress has repeatedly endorsed the goals of and directed the FCC to continue to implement the credit for minority ownership in comparative proceedings, as well as other FCC minority ownership policies.[6] Moreover,

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[5] *See* 68 F.C.C.2d at 982-84. One of the policies adopted in that proceeding—the distress sale policy—is before the Court in No. 89-700.

[6] As a foundation for the statutory enactments discussed below, Congress has held numerous hearings to explore the problem of lack of minority ownership of broadcast stations. *See, e.g., Hearing*

Congress has expanded on policies adopted by the Commission. In 1982, for example, Congress amended the Communications Act to authorize the FCC to award licenses by a system of "random selection," or lottery. The legislation directed the FCC, in creating any such procedure, to grant "an additional significant preference . . . to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). The conference report accompanying the bill stated that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 (Conf. Rep.), 97th Cong., 2d Sess. 43 (1982) (hereinafter H.R. Rep. No. 765). Consequently, this provision for a minority preference was intended to be "[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into . . . the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media . . . ." *Id.* at 44.[7]

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on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) [hereinafter *1989 Hearing on Minority Ownership*]; *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986) [hereinafter *Hearings on H.R. 5373*]; *Minority Participation in the Media—Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *1983 Hearings on Minority Participation*]; *Parity for Minorities in the Media—Hearings on H.R. 1155 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings on H.R. 1155*].

[7] Congress had enacted a similar statutory scheme a year earlier. *See* Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Rep. No.

In 1987, after the FCC had opened an inquiry concerning the validity of its minority ownership policies (*see* page 13 below), Congress included the following provision in the FCC's appropriations legislation:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R. 2d [1301] (1982) and Mid-Florida Television Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

Continuing Appropriations Act For Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329, 1329-31 (1987). The Senate Appropriations Committee, where the provision originated, explained: "The Congress has expresed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of

208 (Conf. Rep.), 97th Cong., 1st Sess. 897 (1981). The FCC chose not to implement that statute for several reasons, including a "lack of specificity in both the statute and the legislative history" regarding preferences to be accorded minorities in any lottery licensing system. *Random Selection/Lottery Systems*, 89 F.C.C.2d 257, 279 (1982). Congress enacted a revised statute within several months, re-emphasizing the seriousness with which it viewed the "severe underrepresentation of minorities" and the importance of provisions in the statute designed to enhance diversity of ownership by increasing the number of minority owners of radio and television stations. *See* H.R. Rep. No. 765 at 43; Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982).

ownership results in diversity of programming and improved service to minority . . . audiences." S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987) (hereinafter S. Rep. No. 100-182). Congress has twice extended its prohibition of the use of appropriated funds on modification or repeal of the minority enhancement credit and other minority ownership policies.[8]

4. *Administrative Proceedings In This Case*

This case involved a comparative proceeding to select one among three mutually exclusive applications filed by petitioner Metro Broadcasting, Inc., Rainbow Broadcasting Co. and Winter Park Communications, for a license to construct a new UHF television station to serve the Orlando, Florida metropolitan area. Following an evidentiary hearing, the Administrative Law Judge granted Metro's application, preferring Metro over Winter Park Communications. *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073 (ALJ 1983). The ALJ had disqualified Rainbow Broadcasting Co. from the comparative consideration for what he found was lack of candor in its application. *Id.* at 1086-87; *see* Pet. App. 66a. On review of the ALJ's initial decision, the Commission's Review Board disagreed with the ALJ's candor finding and concluded that Rainbow was qualified. Thus, it proceeded to consider Rainbow's comparative showing, which it found was superior to Metro's. Accordingly, the Board reversed the ALJ's grant to Metro and awarded the construction permit to Rainbow. Pet. App. 64a.

Specifically, the Board concluded that Rainbow's proposal for integration of ownership and management was

[8] *See* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); *see also* S. Rep. No. 101-144, 101st Cong., 1st Sess. 86 (1989); H.R. Rep. No. 101-299 (Conf. Rep.), 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989); 135 Cong. Rec. S12,265 (daily ed. Sept. 20, 1989).

both quantitatively and qualitatively superior. On quantitative grounds, the Board found a "clear" difference between the applicants. Pet. App. 87a. Owners of Rainbow with 90% interest would participate full time in the station's operation while owners of Metro with only 79.2% interest would be full time participants. In addition, Rainbow was awarded a substantial qualitative enhancement credit to its integration proposal for minority participation by 90% of its owners in contrast with Metro's minority credit for only 19.8% of its owners. The Board also found that Rainbow was entitled to "very slight[]" credit for its 5% female ownership. *Ibid.* Rainbow also received credit for its broadcast experience because the past broadcast experience of one, an 85% owner, was found to be much more significant and was attached to larger ownership than that of Metro's principals having broadcast experience. Metro was awarded a moderate preference for superior local residence and civic participation. Overall, the Board concluded that although the qualitative comparison between Rainbow and Metro was close, Rainbow's substantial minority enhancement credit in conjunction with its preference for broadcast experience, outweighed Metro's local residence and civic participation advantage. In sum, the Review Board awarded Rainbow a slight overall integration preference over Metro. *Id.* at 86a-88a.

The Commission denied review of the Board's decision, stating that it "agree[d] with the Board's resolution of the case." Pet. App. 61a. In its order, the Commission made clear, however, that the credit awarded Rainbow for its female ownership did not affect the outcome of the case. *Ibid. See also* Pet. App. 49a n.1.

5. *Intervening Developments*

Metro sought judicial review of the Commission's order in the court of appeals, but disposition of its appeal was delayed because the court granted, at the Commission's request, a remand of the record for further consideration in light of a separate non-adjudicatory inquiry proceeding at the Commission to explore the validity of the

minority and female ownership policies including the minority enhancement credit. *See Notice of Inquiry on Racial, Ethnic or Gender Classification (MM Docket No. 86-484)*, 1 FCC Rcd 1315, 1317-18 (1986).[9] On remand, the Commission concluded initially that the choice in this particular licensing proceeding between Rainbow and Metro could well depend on whatever conclusion the Commission came to in its general inquiry in Docket 86-484. Accordingly the Commission ordered the licensing proceeding held in abeyance pending further action in Docket 86-484. *See Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) (Pet. App. 52a).

Prior to the Commission's completion of its inquiry in that proceeding, Congress enacted and the President signed into law legislation that appropriated funds for Commission salaries and expenses for fiscal year 1988, with the aforementioned proviso that prohibited the Commission from spending any appropriated funds to reexamine or change any of the minority ownership policies. *See* page 10 above. In compliance with this legislation, the Commission ordered its MM Docket No. 86-484 closed, thereby terminating the inquiry. *See Order (MM Docket No. 86-484)*, 3 FCC Rcd 766 (1988). In addition, the Commission reaffirmed its grant of the license

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[9] That inquiry grew out of the court of appeals' decision in *Steele v. FCC*, 770 F.2d 1192 (D.C.Cir. 1985), *vacated & reh. en banc granted*, Order of Oct. 31, 1985, *remanded*, Order of Oct. 9, 1986, *mandate recalled*, Order of June 9, 1988, *remanded*, Order of Aug. 15, 1988. In that case a panel of the court of appeals had held that the FCC lacked statutory authority to grant enhancement credits in comparative licensing proceedings to women owners. Although the court observed that "the Commission's authority to adopt minority preferences . . . is clear" (*id.* at 1196), the court's opinion nevertheless raised questions concerning the FCC's minority ownership policies. In a request for remand in the *Steele* case, the Commission explained that it had begun to have reservations, in light of developments in the law, that it had not established an adequate factual basis for its policies encouraging female and minority ownership. Upon grant of its remand request, the Commission began the Docket No. 86-484 inquiry.

in this case to Rainbow Broadcasting Co. *See Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (Pet. App. 48a).

B. The Court of Appeals' Decision

The court of appeals affirmed. The court concluded that "[t]he issue regarding the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved because this case is controlled by our decision in *West Michigan*, 735 F.2d 601." Pet. App. 10a.[10] Noting that *West Michigan* had ruled on the same policy, the court pointed out that two principal factors had led the *West Michigan* court to find that that policy " 'easily passes constitutional muster,' " (*ibid.*):

> "First, the Commission's award of minority enhancements is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters. Second, the Commission's action in this case came on the heels of highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media."

Id. at 10a-11a, *quoting*, *West Michigan*, 735 F.2d at 613-14 (emphasis in original).

The court below concluded that the holding in *West Michigan* was not affected by the Court's subsequent decisions in the area of race-conscious policies. Pet. App. 12a. *West Michigan* had relied primarily on the Court's decisions in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of the University of California v. Bakke*,

[10] The court stated at the outset that it would "consider only the legality of the FCC's use of a qualitative enhancement for minority ownership" in light of the Commission's determination that "the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation" (Pet. App. 10a n.5).

438 U.S. 265 (1978), and the court of appeals observed that subsequent decisions, in particular *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), had not "repudiated" either of those cases. Pet. App. 12a. Indeed, the court stated that Justice O'Connor's opinion in *Croson* "relied heavily on the reasoning of *Fullilove* and . . . none of the opinions in [*Croson*] expresses any disagreement with *Bakke*, in which Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination." Pet. App. 13a.

The court of appeals also found significant two "crucial differences between the set-aside program upheld in *Fullilove* and the plan struck down in [*Croson*], and in both respects the FCC's policy is more similar to the *Fullilove* program . . . ." Pet. App. 13a. The court pointed to the fact that the plan at issue in *Croson* involved " 'an unyielding racial quota' " (*ibid.*), while the policy applied by the FCC "is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas . . . and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." *Ibid.* In addition, the court noted the distinction made in *Croson* between programs enacted by Congress and those adopted by states or local governments. *Croson* emphasized that " 'in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress . . . .' " *Croson*, 109 S.Ct. at 718, *quoting*, *Fullilove*, 448 U.S. at 483. The minority enhancement policy, the court of appeals pointed out, had received Congress' "express approval." Pet. App. 14a.[11]

On June 21, 1989, the court of appeals denied petitions for rehearing and suggestions for rehearing en

[11] Judge Williams dissented from the court's holding with respect to the constitutionality of the minority enhancement. In his view, the *West Michigan* decision has been "largely undermined" by *Croson* and by *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *See* Pet. App. 18a.

banc filed by Metro Broadcasting Co. and by Winter Park Communications. Pet. App. 96a, 98a.

SUMMARY OF ARGUMENT

The minority enhancement policy is a race-conscious measure that has been ordered by Congress in each of the last three years as a part of the FCC's appropriations legislation. The Court should afford "great weight" to Congress' judgment that an increase in minority ownership of broadcast stations will enhance the diversity of broadcast programming to the benefit of both the minority and non-minority audience. Congress had an ample basis for acting to enhance broadcast diversity. Its attention has been focused on the problem of a lack of minority participation in the broadcast industry for at least six years prior to its adoption of the minority enhancement policy in 1987, during which time it held numerous hearings on this subject.

The promotion of diversity in broadcast programming is a sufficiently "compelling" governmental interest to permit the use of a race-conscious policy. A diversity of broadcast programming has long been an important objective underlying the regulation of broadcasting, and the absence of minority participation in broadcasting has a deleterious effect on programming diversity. Membership in a minority group is likely to provide distinct perspectives on matters of contemporary public concern that are relevant in assessing a person's potential contribution to diversity, whether the desired diversity is sought for a university classroom or for the broadcast airwaves. When the process of determining the composition of broadcast programming involves the direct participation of minorities, the programming is more likely to reflect fairly the different perspectives of minority groups, to the benefit of both the minority and non-minority community.

The Court recognized in 1976 the relationship between programming in the public interest and minority participation in the programming process as employees of broadcast stations. *NAACP v. FPC*, 425 U.S. 662, 670 n.7

(1976). Minority participation as owners of broadcast stations is even more significant because the FCC has long regarded ownership as a key determinant of broadcast program content.

There is a compelling need for the broadcast industry to reflect fairly the viewpoints and perspectives of minority groups. Before Congress acted, both the Kerner Commission in 1968 and the United States Civil Rights Commission in 1977 had warned of the serious consequences of allowing the broadcast medium, which the Court has described as "demonstrably a principal source of information and entertainment for a great part of the Nation's population," *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968), to be dominated by whites.

The minority enhancement and other statutory policies that seek to further minority ownership of broadcast stations should also be viewed as an effort by Congress to remedy the effects of past discrimination. Congress can define and remedy the effects of prior society-wide discrimination, at least insofar as its remedial action is directed at an industry whose owners are selected by a federal licensing agency and whose ownership patterns were established at the same time societal discrimination against minorities was at its peak. Insofar as Congress was remedying discrimination, it should receive more than customary deference because of its special responsibility, as set forth in the fourteenth amendment, to enforce the constitutional right of equal protection.

The minority enhancement credit is narrowly tailored to serve its objectives. As discussed above, membership in a minority group is likely to provide a distinct perspective on public issues that can reasonably be expected to influence the programming of minority owned stations.

The FCC, and subsequently Congress, turned to the minority enhancement credit and related race-conscious licensing measures only after seeking for many years to encourage diversity of ownership without consideration of race. When the agency's general approach to diversification did not succeed where minorities were con-

cerned, and the *Kerner Commission Report* dramatically brought the problem to the FCC's attention, the FCC did not proceed immediately to adopt the minority enhancement credit and other race-conscious licensing policies. The agency instead first resorted to rules which sought to require licensees to employ more minorities and to ascertain the needs of their minority audience. Before Congress adopted the minority enhancement credit in 1987, the FCC had also relaxed the minimum showing necessary to demonstrate financial qualifications to receive a broadcast license, and had increased the number of new broadcast stations available for initial licensing. In view of the failure of the FCC's various initiatives to improve significantly the level of minority participation, Congress properly exercised its broad discretion to select the methods for pursuing its objectives when it compelled the Commission to utilize the minority enhancement credit and other race-conscious licensing policies. The methods Congress has chosen do not undermine the important countervailing goal of stability in the broadcast industry.

The burden imposed on innocent non-minorities by the minority enhancement credit is permissible. The minority enhancement credit is only one of many factors considered by the Commission in granting broadcast licenses. No non-minority is deprived from having all of its comparative attributes weighed, and the minority enhancement credit does not insure that a minority applicant will prevail. Moreover, the policy involves no attempt to remove existing owners for the purpose of making room for new minority owners.

ARGUMENT

I. THE MINORITY ENHANCEMENT POLICY REFLECTS A DELIBERATE AND CONSIDERED CONGRESSIONAL CHOICE.

A. The Policy Is Statutorily Mandated.

The policy of granting enhancement credit to minority owners who will also work at the proposed station as one factor in the FCC's multi-factor evaluation of competing

applicants for a broadcast license reflects a deliberate congressional choice. Congress has repeatedly addressed the problem of lack of minority ownership of radio and television stations. It has found that there is a need for increased minority ownership, endorsed policies implemented by the FCC including the minority enhancement credit, enacted programs of its own creation and ultimately enacted into law the minority enhancement credit and other programs to increase minority representation among radio and television station owners.

In the three most recent appropriations acts governing the FCC, Congress has explicitly instructed the Commission to continue to implement the minority ownership policies, including the policy "with respect to comparative licensing." Pub. L. No. 100-202, 101 Stat. 1329-31 (1987).[12] The Senate Report on that legislation explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 100-182 at 76.

The Senate Report in 1987 noted that in 1982 Congress enacted legislation authorizing the use of "random selection" in the FCC licensing process, but specifically requiring that significant preferences for minority applicants be incorporated into any random selection licensing scheme. *Ibid.* *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii).[13] The

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[12] *See also* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

[13] Contrary to the views of the petitioner and the United States (Pet. Br. at 45 n.109; U.S. Br. at 19) the 1982 legislation is rele-

conference report on that legislation found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 at 43. The report also found ownership preferences to be "an important factor in diversifying the media of mass communications" (*ibid.*) and stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." *Id.* at 40. As the conference report explained, "[i]t is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." *Id* at 43.

The conference report expressly endorsed the FCC's minority ownership policies, including the minority enhancement credit, as proper means to achieve diversity. *See* H.R. Rep. No. 765 at 44 ("Evidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts. See, in this regard, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978)."). As the court of appeals stated in *West Michigan*, not only did Congress make clear its approval of the Commission's minority enhancement policy, its enactment of the lottery legislation "was intended to assure that the FCC's minority ownership policies would not be abandoned if the comparative evaluation process of which they were a part was abandoned." *West Michigan*, 735 F.2d at 613 & n.17.

Thus Congress through the appropriations legislation and the 1982 lottery legislation has codified the FCC's minority ownership policies and essentially endorsed the FCC's basis for those policies. Specifically, those policies

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vant in determining Congress' intent in enacting into law the minority enhancement credit for 1988 and subsequent fiscal years. *See Fullilove*, 448 U.S. at 463-467 (plurality opinion); *id.* at 503 (Powell, J.).

reflected the Commission's view that diversity in broadcast programming is critical, that there is a need for race-conscious remedies like the minority enhancement credit in licensing broadcast stations, and that increasing ownership diversity leads to increased program diversity.[14] Far from being "delphic," as the United States describes Congress' action (U.S. Br. at 19), Congress' repeated re-enactment of the 1987 legislation in successive years, in the context of consistent Congressional support over nearly a decade for race-conscious policies designed to increase minority ownership of broadcast stations, reflects its clear intent to enact into law the minority enhancement credit.

Moreover, the contentions of petitioner that these congressional actions do not enact the policies into law because they were taken in the context of appropriations legislation are groundless. *See* Pet. Br. at 49-50; *see also* U.S. Br. at 19. The Court has recognized that when Congress makes its intention clear, there is no question that it may take any action within its power through an appropriations act or any other duly enacted form of legislation. *United States v. Will*, 449 U.S. 200, 221 (1980), *citing*, *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *Belknap v. United States*, 150 U.S. 588, 594 (1893); *United States v. Mitchell*, 109 U.S. 146, 150 (1883). Where a policy that Congress wishes to embody in statutory form is already in existence at the agency level, Congress does not have to spell out in a statute the specific provisions of the policy in issue, but instead, if it chooses, Congress can accomplish the same purpose by simply ordering the agency to keep the policy intact. Here, there can be no serious doubt that Con-

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[14] *See Winter Park*, 873 F.2d at 355 (Pet. App. 14a) ("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses."); *see also West Michigan*, 735 F.2d at 615.

gress' intention in three successive appropriations acts was to enact into law the minority enhancement credit.[15]

Because the minority enhancement credit has been statutorily mandated, the present case thus requires the Court "to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform.'" *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). In performing this task, the Court accords "great weight" to Congressional judgments. *Rostker v. Goldberg*, 453 U.S. at 64, quoting *CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973), even where fundamental constitutional rights are involved. *Ibid.; Fullilove*, 448 U.S. at 472 (plurality opinion). Congress is entitled to at least this "customary deference."[16]

B. Congress Had An Ample Basis On Which To Codify The Policy.

In its consideration and enactment of legislation dealing with minority ownership of broadcast stations, Congress had available to it ample evidence upon which to base its conclusion that there is a need for these limited remedial efforts in the broadcast area. For example, the conference report accompanying the 1982 lottery legislation stated that "[e]vidence of the need for such preferential treatment has been amply demonstrated by the

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[15] Petitioner's and the United States' reliance on *TVA v. Hill*, 437 U.S. 153 (1978) is misplaced. *See* Pet. Br. at 49-50; U.S. Br. at 19. As the Court has explained, the narrow holding of that case on the issue relevant here is that "courts should be wary of inferring congressional intent to alter the force of existing law from an Appropriations Act." *Ramah Navajo School Board, Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 842 n.6 (1982), *citing*, *TVA v. Hill*, 437 U.S. at 189-91. Congressional intent in these appropriations act is clear, as discussed above. And Congress did not repeal or alter existing law, but rather enacted into law long-standing FCC policies.

[16] *Rostker v. Goldberg*, 453 U.S. at 64. When Congress is enforcing the constitutional right of equal protection, it is entitled to more than customary deference. *See* pages 34-35 below.

Commission, the Congress, and the courts." H.R. Rep. No. 765 at 44. The conference report referred specifically to the FCC's *1978 Minority Policy Statement* and the related *Minority Ownership Task Force Report*. The Minority Ownership Task Force had found that minorities "continue[d] to be underrepresented among broadcast station owners" and that significant barriers in the areas of financing, industry experience and information about ownership opportunities continued to "hinder the entrance of minority broadcasters." *Minority Task Force Report* Summary at 1.

The FCC's *1978 Minority Policy Statement* endorsed these findings, concluding that "additional measures are necessary and appropriate" to address a situation in which "the views of racial minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980-81 (footnote omitted). The conference report also relied explicitly on the Court's decision in *Fullilove*[17] and on the decision of the court of appeals in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C.Cir. 1971), *clarified*, 463 F.2d 822 (D.C.Cir. 1972).[18] H.R. Rep. No. 765 at 44.

Congress has also regularly conducted hearings to acquire information with specific reference to partici-

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[17] Specifically, the conference report noted the Court's reference in *Fullilove* to numerous "congressional observations with respect to the effect of past discrimination on current business opportunities for minorities . . . ." 448 U.S. at 467 n.55. *See* H.R. Rep. No. 765 at 44.

[18] *Citizens Communications Center* did not involve a race-conscious policy. However, the conference report referred to language in the opinion in that case emphasizing that an important aspect of the public interest standard of the Communications Act "is the need for diverse and antagonistic sources of information. . . . 'The Commission . . . may also seek in the public interest to certify as licensees those who would speak out with fresh voices, would most naturally initiate, encourage, and expand diversity of approach and viewpoint.' . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." 447 F.2d at 1213 n.36. *See* H.R. Rep. No. 765 at 44.

pation by minorities in the broadcasting industry. *See* n.6 above. These hearings have provided extensive evidence of the severe underrepresentation of minorities in the ownership of radio and television stations.[19]

In addition, Congress was aware of conclusions of the *Kerner Commission Report* and the United States Commission on Civil Rights concerning the need for policies directed to the extreme underrepresentation of minorities in the broadcasting industry. *See Kerner Commission Report* at 201-12; United States Commission on Civil Rights, *Window Dressing on The Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing On The Set: An Update* (1979). These reports were referred to repeatedly in various congressional hearings.[20]

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[19] *See, e.g., Hearings on H.R. 5373* at 1 (statement of Rep. Collins that fewer than 2% of stations minority owned); *id.* at 13 (statement of Rep. Wirth to same effect); *id.* at 89-90 (reporting figures compiled by FCC to same effect); *id.* at 116 (statement of broadcast industry executive to same effect); *1983 Hearings on Minority Participation* at 7 (statement of Wilhelmina Cooke, representative of Black Citizens for a Fair Media comparing minority ownership of 2% of broadcast stations to minority representation of 20% of population); *id.* at 21, 28-29 (statement of Paul Yzaguirre representing La Raza citing statistics on lack of Hispanic participation in broadcast industry); *id.* at 61-63, 138 (statement of Arnold Torres representing League of United Latin American Citizens to same effect); *id.* at 39 (statement of Peggy Charren representing Action for Children's Television citing lack of minority representation in both broadcast station and cable television system ownership); *Hearing on H.R. 1155* at 3 (statement of Rep. Collins citing statistics showing that fewer than 2% of broadcast stations and 1% of cable systems are minority owned); *id.* at 147 (ownership study done by National Ass'n of Broadcasters); *id.* at 192 (survey of "Minority Business Involvement in the Telecommunications Industry" prepared for the Minority Business Development Agency of the Department of Commerce).

[20] *See, e.g., 1983 Hearings on Minority Participation* at 7, 20, 101, 155. In addition, other studies by groups such as the NAACP, the Radio-Television News Directors Association, the Screen Actors Guild, the League of United Latin American Citizens and the National Association of Broadcasters were entered into the record of these hearings. *See id.* at 46, 47, 69, 170.

Most recently, the Congressional Research Service conducted a study of minority ownership and programming on broadcast stations which found (1) that minorities continued to be underrepresented among those controlling broadcast stations and[21] (2) that there is a "strong indication" that ownership of stations by minorities resulted in a greater degree of minority programming. *See* Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988) (hereafter *CRS Report*).[22]

Even if Congress had not given such extensive consideration in recent years to the question of increased participation by minorities in the broadcasting industry, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (plurality opinion). Indeed, Justice Stevens' dissent in *Fullilove* pointed out that the set-aside provisions of the legislation before the Court in that case were "not even mentioned in the . . . Reports of either the House or the Senate committee that processed the legislation, and was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted." 448 U.S. at 549-50.

The plurality opinion in *Fullilove* relied extensively on a congressional report that drew "presumptions"

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[21] The *CRS Report* found that 13.4% of stations had one or more minority owners, but that minorities held a controlling interest in only 3.5% of stations. *See CRS Report* at CRS-9.

[22] The dissent below (Pet. App. 23a-29a) is certainly correct that the *CRS Report* does not *prove* a link between minority ownership and diverse programming. However, this Court has recognized that "'[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *FCC v. NCCB*, 436 U.S. at 796-97. With its flaws, which the *CRS Report* itself acknowledges (*see CRS Report* at Summary, CRS-1—CRS-5), its conclusions nevertheless lend support to similar conclusions reached in the reports published over a number of years by the FCC, the Kerner Commission, the Civil Rights Commission and congressional committees discussed above.

from statistical information demonstrating substantial underrepresentation by minorities as business owners. Referring to this information, the Chief Justice's opinion quoted favorably a congressional report that had observed that "'[t]hese statistics are not the result of random chance. The *presumption* must be made that past discriminatory systems have resulted in present economic inequities.'" 448 U.S. at 465 (Burger, C.J.), *quoting*, H.R. Rep. No. 94-468, 94th Cong., 2d Sess. 30 (1975) (emphasis added). Similar statistical materials led the conference report on the 1982 lottery legislation to conclude that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765 at 43.

Justice Powell observed in *Fullilove* that Congress' "constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. . . . Congress is not expected to act as though it were duty bound to find facts and make conclusions of law." 448 U.S. at 502. Accordingly, he concluded that

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Id. at 502-03. *See also City of Richmond v. J.A. Croson, Co.*, 109 S.Ct. 706, 719 (1989) (O'Connor, J.); *id.* at 736 (Scalia, J.). So too, here, Congress was not legislating in a vacuum when it enacted into law the minority enhancement credit and other minority ownership policies. The minority enhancement credit had been in effect for more than nine years as an administrative

policy before Congress enacted it into law, and Congress was aware of congressional, judicial and agency findings over an even longer period, including its own inquiries and experience relating to the need for remedial policies in the broadcast area as well as more general findings such as the ones cited in *Fullilove*, along with findings of the *Kerner Commission Report*, reports of the U.S. Commission on Civil Rights and the FCC. *See* H.R. Rep. No. 765 at 44; S. Rep. No. 100-182 at 76.

Whether there is some irreducible minimum of evidence Congress must have to support its policy judgment that there is a need to employ race-conscious policies is a question that the Court need not decide here. It is plain that the evidence before Congress in this instance exceeded any reasonable minimum that might apply.

II. THE MINORITY ENHANCEMENT CREDIT SERVES THE COMPELLING GOVERNMENTAL INTERESTS OF PROMOTING DIVERSITY IN BROADCAST PROGRAMMING AND REMEDYING DISCRIMINATION.

A. The Minority Enhancement Credit Furthers Broadcast Program Diversity, Which Is Analogous To The Interest In Student Body Diversity.

The minority enhancement credit and other minority ownership policies, which Congress subsequently has embodied in statutory form, were initially implemented at the Commission as methods for promoting diversity. The Commission has set forth in detail the diversity-related basis for its minority ownership policies:

> Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

> . . . In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

1978 Minority Policy Statement, 68 F.C.C.2d at 980-81. The goal of the FCC's race-conscious policies, now mandated by Congress, is thus quite different from the "role model" theory criticized in *Wygant* (*see* 476 U.S. at 274-75) in that the FCC policies assume "that viewers and listeners of *every* race will benefit from access to a broader range of broadcast fare, not that consumers will inevitably gravitate towards programming disseminated by licensees of their own race." *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 942 (D.C.Cir. 1989), *cert. granted*, 110 S.Ct. 715 (1990) (Wald, C.J., dissenting) (emphasis in original).[23]

In the context of higher education, promotion of student body diversity has been found to constitute a sufficiently compelling government interest to warrant the use of race-conscious policies. *See Bakke*, 438 U.S. at 311-19 (Powell, J.) (concluding that race could be considered as one factor in a university's admission program because "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."). Justice O'Connor has observed that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 286 (O'Connor, J.), *citing Bakke*, 438 U.S. at 311-15 (Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-17 (Stevens, J., dissenting). *See also Croson*, 109 S.Ct. at 730 (Stevens, J., concurring). And Justice O'Connor added: "[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Wygant*, 476 U.S. at 286 (O'Connor, J.).

[23] Metro and the United States are thus mistaken in their view (Pet. Br. at 38, U.S. Br. at 26) that the goal of the minority enhancement credit is analogous to the role model theory discussed in *Wygant*. *See also Waters Broadcasting Corp.*, 91 FCC 2d at 1264-65 (1982) ("[T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs" but are based on the agency's prediction that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation. . . ."); *Clear Channel Broadcasting*, 83 F.C.C.2d 216, 221 (1980), *aff'd, Loyola Univ. v. FCC*, 670 F.2d 1222 (D.C Cir. 1982) ("[W]e believe that minority-controlled stations can have the additional function of educating nonminorities about minority viewpoints . . . ."); *1978 Minority Policy Statement*, 68 F.C.C.2d at 981.

Promoting diversity, in the context of broadcast station ownership, has repeatedly been found by the court of appeals to be a compelling government interest warranting use of race-conscious policies. In *TV 9, Inc.* the court of appeals noted the Commission's longstanding policy under the Communications Act of promoting diversity of ownership of broadcast stations along with the established connection between ownership diversity and the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.*, 495 F.2d at 937. The court also took note of the extreme underrepresentation of minorities in the ownership of broadcast stations. *See id.* at 937 n.28. Based on these considerations, the court concluded that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has

> proven to be significantly influential with respect to editorial comment and the presentation of news.

Id. at 938 (footnotes omitted). *See also Garrett v. FCC*, 513 F.2d at 1063; *West Michigan*, 735 F.2d at 614. As discussed below, the Court should now conclude that the government's interest "in ensuring that all of its people have access to a wide and varied range of broadcast options" is "every bit as compelling as its interest in creating a diverse student body within a public university." *Shurberg*, 876 F.2d at 943 (Wald, C.J., dissenting) (footnote omitted).

The first amendment goal of achieving the "widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), clearly extends beyond the classroom. In particular the Court has repeatedly found that this goal properly underlies the FCC's regulation of the broadcasting industry in the public interest. *See FCC v. NCCB*, 436 U.S. at 795; *CBS, Inc. v. DNC*, 412 U.S. at 102; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969). Indeed, diversity is of critical importance in the broadcast context because "broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).[24] For those members of society who never have the opportunity to benefit from exposure to the diverse students and other sources of learning available at a university, the broadcast medium may well be their best opportunity to receive diverse "social, political, esthetic, moral, and other ideas and experiences." *Red*

[24] *See also* U.S. Commission on Civil Rights, *Window Dressing on the Set* at 1 ("Television plays the dominant role in the mass communication of ideas in the United States today. . . . Television does more than simply entertain or provide news about major events of the day. It confers status on those individuals and groups it selects for placement in the public eye, telling the viewer who and what is important to know about, think about, and have feelings about.").

Lion, 395 U.S. at 390; *see Shurberg*, 876 F.2d at 943 (Wald, C.J., dissenting).[25]

The dissent below has suggested that race is relevant in measuring a person's potential contribution to diversity only when the potential beneficiaries of diversity can personally "see individual members of ethnic groups as they are." *Winter Park*, 873 F.2d at 357 (Pet. App. 21a) (Williams, J., dissenting in part). Certainly, *a* benefit of ethnic diversity experienced firsthand is the removal of unfounded prejudices against the essential human worth of members of other racial and ethnic groups. There is no reason to conclude, however, that Harvard University, for example, believes that this is the only benefit to be obtained from the presence as students of members of minority groups.

In any event, the Court has previously referred approvingly to FCC regulations which were premised on the judgment that the audience for broadcast programming will benefit from minority participation in the process of determining the composition of that programming. The Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that

[25] Contrary to the suggestion of the United States (U.S. Br. at 28 n.18), the Commission's decision to repeal the content-based fairness doctrine regulation that was upheld in *Red Lion* does not diminish the interest in structural policies, of which the minority enhancement credit and other minority ownership policies are examples, that seek to allocate licenses so as to promote diversity. The FCC eliminated the fairness doctrine principally because it concluded that the fairness doctrine was a content-based regulation of speech that unduly intruded on, and chilled, broadcasters' first amendment rights. *See Syracuse Peace Council*, 2 FCC Rcd 5043, 5052 (1987), *reconsid. denied*, 3 FCC Rcd 2035, 2041 n.56 (1988), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990). Indeed the Commission expressly emphasized in the fairness doctrine proceeding that its action did not "call[] into question the constitutionality of our content-neutral structural regulations designed to promote diversity." 3 FCC Rcd at 2041 n.56. *See also Shurberg*, 876 F.2d at 944 & n.24 (Wald, C.J., dissenting).

its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. at 670 n.7.

B. The Minority Enhancement Credit Also Serves The Compelling Governmental Interest In Remedying The Effects Of Past Discrimination.

Unlike the interest in broadcast diversity, which the Court is asked herein to accept as a compelling governmental interest for purposes of race-conscious policies, the Court has already identified the remedying of past discrimination as such an interest. The Chief Justice and Justice White joined Part II of Justice O'Connor's opinion in *Croson*, which stated that although general societal discrimination was not a sufficient factual predicate for race-conscious action at the state and local level, "Congress may identify and redress the effects of society-wide discrimination." *Croson*, 109 S.Ct. at 719 (O'Connor, J.).[26]

Whatever limits may exist on the scope of congressional power in this area, the broadcast industry is an appropriate area within which Congress "may identify and redress the effects of society-wide discrimination," *Croson*, 109 S.Ct. at 719 (O'Connor, J.), because a federal licensing agency has played a major role in the establishment of ownership patterns in this industry.

Broadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson*, involves the use of a unique, limited resource pursuant to a system of government licensing. The most desirable licenses—those using the frequencies with widest coverage and in the largest communities—were issued during the formative years of the industry, which also happened to be when societal discrimination against minorities was at its peak.[27] These stations were obtained at a modest cost by today's standards.[28] Entrenched ownership patterns understandably have developed because, as the Court has recognized, the Commission has "consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC v. NCCB*, 436 U.S. at 805. The FCC's justifiable efforts to preserve existing meritorious service have, however, had the effect of inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees. *See, e.g., Minority Task Force Report* at 10 (noting the difficulty in minorities' entry into the broadest industry by applying for a new station on an unused frequency because "there are very few unused frequencies available, particularly in communities of substantial size.").[29]

Thus, after more than forty years of FCC licensing of radio and television stations—from 1934 until 1978—less than one per cent of those stations were controlled by minorities, despite the fact that minorities represented approximately 20 per cent of the population. *1978 Mi-*

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[26] Three other justices have in the past indicated that race-conscious measures may be an appropriate remedy for societal discrimination even when the policies are adopted at the state and local level. *See Bakke*, 438 U.S. at 362, 369-73 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part); *id.* at 396, 399-400 (Marshall, J.). Justice White also joined in Part II of Justice O'Connor's opinion in *Croson*, which, as noted, confines to Congress the power to remedy societal discrimination.

[27] Percy Sutton, Chairman of Inner City Broadcasting, testified before a congressional committee in 1989: "When I sought—when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, sir, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent." *1989 Hearing on Minority Ownership* at 16.

[28] During that same testimony, Percy Sutton described this effect of past discrimination as a "black tax": "[M]inorities, and specifically minorities who are of African descent, have not had the opportunity. In the past, I remarked upon this as a black tax. That is, when we buy a radio station now, we must pay much more money." *1989 Hearing on Minority Ownership* at 16.

[29] As noted below (n.48), the Commission has sought to address the lack of available frequencies by adding frequencies for new applicants.

nority Policy Statement, 68 F.C.C.2d at 981. Such minority ownership had increased to only 3.5% by 1988. *See CRS Report* at CRS-9. The Conference Report on the 1982 lottery legislation found that this severe underrepresentation of minorities did not occur by chance, but was one of the "effects of past inequities stemming from racial and ethnic discrimination. . . ." H.R. Rep. No. 765 at 43. The minority enhancement credit thus is a remedial effort in the broad sense: "it seeks to address (or remedy) a societal problem (the underrepresentation of minorities in the broadcast field, and the consequent lack of diverse programming) which has been caused by past racial discrimination." *Shurberg*, 876 F.2d at 953 n.48 (Wald, C.J., dissenting).

Insofar as the minority enhancement credit is intended to serve remedial goals, Congress is entitled to more than its "customary deference." *Rostker v. Goldberg*, 453 U.S. at 64. Although this case involves the licensing conduct of a federal agency, the fifth amendment's due process clause contains an equal protection guarantee similar to that found in the fourteenth amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). It is thus significant, as Justice O'Connor pointed out in *Croson*, that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S.Ct. at 719 (O'Connor, J.) (emphasis in original), *citing Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *Ex parte Virginia*, 100 U.S. 339, 345 (1880).[30] Con-

[30] *See also Croson*, 109 S.Ct. at 736 (Scalia, J.) ("We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. . . . [I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . . —and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed . . . ."); *Shurberg*, 876 F.2d at 939 n.13 (Wald, C.J., dissenting) ("[W]hile the congressional judgment is not dispositive, it surely makes a difference. Congress has far broader powers than does an administrative agency; its findings of fact are entitled to greater respect; and, unlike the agency, it need not compile a formal record or issue an opinion. Moreover, section 5 of the fourteenth amendment entrusts Congress with the authority to implement equal protection guarantees. These factors do not obviate the need for judicial review, but they do shape the contours of our inquiry.").

gress' broad remedial powers to employ race-conscious policies to remedy the effects of past discrimination, based on its expansive authority generally and enhanced by the fourteenth amendment, have been acknowledged repeatedly. *See, e.g., Fullilove*, 448 U.S. at 477-80 (Burger, C.J.); *id.* at 502-03 (Powell, J.); *Croson*, 109 S.Ct. at 719 (O'Connor, J.); *id.* at 736-37 (Scalia, J.). This power should be no less available when Congress finds it necessary to enforce equal protection guarantees through the public interest based licensing activities of a federal agency such as the FCC.

III. THE MINORITY ENHANCEMENT CREDIT IS NARROWLY TAILORED TO ACHIEVE ITS INTENDED GOALS.

A. The Minority Enhancement Credit Is Only One Factor In The FCC's Multi-Factor Evaluation Of Competing Applicants For Broadcast Licenses.

In his decision in *Bakke*, Justice Powell found constitutional a college admissions program, such as Harvard College's, under which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet . . . does not insulate the individual from comparison with all other candidates." 438 U.S. at 317. Justice Powell added:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all con-

> sideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318. The minority enhancement credit in FCC comparative licensing proceedings operates in a similar manner. Minority ownership is only one part of a multi-factor analysis of the competing applicants. Each applicant is treated as an individual and no applicant is insulated from comparison solely because of his status as a minority.[31]

Thus, while there may be particular cases in which the minority enhancement credit is ultimately determinative because of the facts presented, the Commission's comparative evaluation includes the opportunity for a wide number of factors to be taken into account. It has been recognized that in a comparative proceeding, even a slight disparity can prove to be decisive under the facts and circumstances of a particular proceeding. *See Sacramento Broadcasters v. FCC*, 236 F.2d 689, 693 (D.C. Cir. 1956). Consequently, a prevailing applicant is not preferred because of the importance attached to any one factor but because of the combination of factors which happen to be present in a particular case.

The court of appeals concluded in *West Michigan Broadcasting Co.* that the "FCC comparative evaluation process generally conforms to Justice Powell's model. . . . [I]t explicitly provides for examination of a wide variety

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[31] As we have argued in our brief in No. 89-700 (FCC Br. at 42-43), the absence of such a multi-factor analysis should not be fatal to the race-conscious government program there. *Fullilove*, for example, involved a specific set-aside in which a certain portion of government contracts was reserved for minorities. In a multi-factor evaluation process, however, in which no applicant is insulated from a comparison with other applicants, there is even less basis for claims of constitutionally unequal treatment.

of traits to assess an applicant's potential for increasing diversity and quality of programming." The court of appeals reiterated that conclusion in the decision below. *See Winter Park*, 873 F.2d at 353 (Pet. App. 11a-12a).

More recently the Court addressed this consideration in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In favorably comparing an affirmative action program involving promotion of employees in that case to the Harvard admissions plan discussed by Justice Powell in *Bakke*, the Court said "the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants."[32] The same is true of the operation of the FCC's comparative broadcast licensing policy.

Petitioner relies heavily on the demonstrably erroneous contention that, in practice, the minority enhancement credit is not part of a multi-factor comparison of applicants but, rather, amounts to a *per se* preference for a minority applicant in a comparative licensing proceeding. Petitioner's simplistic listing of initial decisions of Administrative Law Judges (Br. at 23 n.59), as apparent support for its claim that "white male applicants seldom have prevailed in broadcast comparative contests in recent years" (*id.* at 22), is riddled with errors. Numerous FCC rulings, for example, demonstrate that minority or female ownership does not guarantee that an applicant will prevail.[33]

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[32] 480 U.S. at 638. Because the constitutional issues were never presented for argument in *Johnson*, the Court did not reach a determination as to whether the plan could withstand constitutional challenge. *Id.* at 620 n.2.

[33] *See, e.g., Miracle Strip Communications*, 4 FCC Rcd 5064 (1989), *reconsid. denied*, FCC 90-21 (Jan. 21, 1990); *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941 (1985); *Jerome Thomas Lamprecht*, 99 F.C.C.2d 1219, 1223 (Rev. Bd. 1985), *rev. denied*, 3 FCC Rcd 2527 (1988), *appeal pending, Lamprecht v. FCC*, No. 88-1395 (D.C. Cir. June 1, 1988); *Horne Industries, Inc.*, 98 F.C.C.2d 601 (1984); *Vacationland Broadcasting Co.*, 97 F.C.C.2d 485 (Rev. Bd. 1984),

Moreover, the Commission's comparative licensing proceedings are far more complex than Metro's claims suggest.[34] Contrary to Metro's assertions, many factors play a role in the comparative evaluation of applicants, of which the minority enhancement credit is only one. Others include diversification,[35] quantitative integration of ownership and management,[36] local residence,[37] civic participation,[38] coverage area of proposed station,[39] broadcast experience,[40] and environmental impact.[41] Metro's claim

modified, 58 Radio Reg.2d (P&F) 439 (1985); *Absolutely Great Radio, Inc.*, 95 F.C.C.2d 1023 (1983), *rev'd on other grounds, Ventura Broadcasting Co. v. FCC*, 765 F.2d 184 (D.C. Cir. 1984), *modified on remand, Absolutely Great Radio*, 104 F.C.C.2d 1 (1986); *Las Misiones de Bejar Television Co.*, 93 F.C.C.2d 191 (Rev. Bd. 1983), *rev. denied*, FCC 84-97 (May 16, 1984).

[34] Petitioner's claim, for example, that diversification "is seldom a factor in modern comparative hearings" (Pet. Br. at 10) is simply wrong. In fact applicants with other media holdings are often downgraded in a comparative evaluation on diversification grounds. *See, e.g., Sarasota-Charlotte Broadcasting Corp.*, 4 FCC Rcd 8106, 8110 (ALJ 1989); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310, 5337 (ALJ 1989); *Perry Television, Inc.*, 4 FCC Rcd 4603, 4619 (ALJ 1989); *The Baltimore Radio Show*, 3 FCC Rcd 6823, 6826 (ALJ 1988), *aff'd*, 4 FCC Rcd 6437 (Rev. Bd. 1989); *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6598 (ALJ 1988).

[35] *See* n.34 above.

[36] *See, e.g., High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 432 (Rev. Bd. 1983), *rev. denied*, 56 Radio Reg.2d (P&F) 1394 (1984), *aff'd, mem., High Sierra Broadcasting, Inc. v. FCC*, 784 F.2d 1131 (D.C. Cir. 1986).

[37] *See, e.g., Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 945-46 (1985).

[38] *See, e.g., The Baltimore Radio Show*, 4 FCC Rcd at 6440-41.

[39] *See, e.g., 62 Broadcasting, Inc.*, 3 FCC Rcd 4429, 4450 (ALJ 1988).

[40] *See, e.g., James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988). *See also National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987).

[41] *See, e.g., Richardson Broadcasting Group*, 4 FCC Rcd 7989, 7998-99 (ALJ 1989).

that the minority enhancement credit "is dispositive in all but a few cases" (Pet. Br. at 22) is mistaken. Although the FCC has not scientifically surveyed all of its many comparative broadcast licensing proceedings, even of the cases cited by Metro, sixty percent were decided on grounds other than the minority enhancement credit.[42]

[42] Metro acknowledges (Pet. Br. at 23) that in 27 of the 78 cases it cites, the prevailing applicant was not controlled by a minority or woman. Of the remaining cases, at least 20, while involving winning applicants who were minorities or women, were decided on grounds other than the enhancement credit. Indeed, in the very first case cited in Metro's lengthy list, the Administrative Law Judge expressly stated that the winning applicant's "status as a member of a recognized minority group is not of decisional significance. . . ." *Duane Tomko*, 2 FCC Rcd 206, 209 n.3 (ALJ 1987). In numerous other cases cited by Metro, the enhancement credit for minority or female ownership was similarly not the dispositive factor. *See, e.g., Tulsa Broadcasting Group*, 2 FCC Rcd 1149, 1162 (ALJ), *aff'd*, 2 FCC Rcd 6124 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd 4511 (1988); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223, 1238 (ALJ 1987), *aff'd*, 2 FCC Rcd 5513 (Rev. Bd. 1987), *reconsid. denied*, 3 FCC Rcd 488 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 7186 (1988); *Moore Broadcast Industries*, 2 FCC Rcd 2754, 2767 (ALJ 1987); *Armando Garcia*, 2 FCC Rcd 4166, 4168 n.1 (ALJ 1987), *aff'd*, 3 FCC Rcd 1065 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 4767 (1988); *Bogner Newton Corp.*, 2 FCC Rcd 4792, 4805 (ALJ 1987); *Gali Communications, Inc.*, 2 FCC Rcd 6967, 6994 (ALJ 1987); 62 *Broadcasting, Inc.*, 3 FCC Rcd 4429, 4450 (ALJ 1988), *aff'd*, 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989), *rev. denied*, FCC 90-48 (Feb. 13, 1990); *Key Broadcasting Corp.*, 3 FCC Rcd 6587, 6600 (ALJ 1988); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581, 585 (ALJ 1989); *Corydon Broadcasting, Ltd.*, 4 FCC Rcd 1537, 1539 (ALJ 1989), *remanded*, Order of Dec. 6, 1989 (Rev. Bd.); *Perry Television, Inc.*, 4 FCC Rcd 4603, 4618, 4620 (ALJ 1989); *Radio Delaware, Inc.*, 4 FCC Rcd 5555, 5564 (ALJ 1989); *Shawn Phalen*, 4 FCC Rcd 5714, 5726 (ALJ 1989), *remanded*, 5 FCC Rcd 53 (Rev. Bd. 1990); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6543, 6551 (ALJ 1989); *Inlet Broadcasting Co., Inc.*, 4 FCC Rcd 6760, 6762 (ALJ 1989); *Don H. Barden*, 4 FCC Rcd 7043, 7045 (ALJ 1989); *Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7802, 7812 (ALJ 1989); *Richardson Broadcasting Group*, 4 FCC Rcd 7989, 7999 (ALJ 1989); *Silver Springs Communications, Inc.*, 5 FCC Rcd 469, 479 (ALJ 1990).

Nonetheless, the purpose of the enhancement credit for minority ownership is to encourage minorities to apply for licenses and to increase the number of stations owned by minorities. It is natural to expect that there would be an increasing number of minorities who apply for licenses and an increasing number of minority applicants who prevail in comparative proceedings. Still, minority ownership is, in fact, only one of many factors that the Commission considers in granting license applications, and the mere existence of minority ownership is not dispositive in the analysis.

It nevertheless remains that despite more than a decade of operations of this policy, in conjunction with other FCC ownership policies, minorities, while controlling significantly more stations than a decade ago, continue to be severely underrepresented among owners of radio and television stations, controlling at most 3.5% of radio and television stations. *See CRS Report* at CRS-9. To the extent that the minority enhancement credit program has played a role in encouraging more minority applicants and in the limited growth in minority controlled radio and television stations, it is ironic that Metro attempts to turn the program's limited success against it to argue that *any* consideration of minority ownership as part of the FCC's multi-factor evaluation of applicants for broadcast stations is unconstitutional.

Nor does the minority enhancement credit involve any "quota" or "set aside." No particular number or percentage of licenses have been reserved for minorities. Non-minorities remain free to compete in all cases subject to this policy, and, as noted above (*see* n.33), minority status does not ensure that an applicant will prevail in a comparative licensing proceeding. As the court of appeals observed, one of a number of factors distinguishing this case from *Croson* is that the plan at issue in *Croson* involved " 'an unyielding racial quota' " while the minority enhancement credit policy "is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas . . . and minority ownership is simply

one factor among several that the Commission takes into account in the award of broadcast licenses." *Winter Park*, 873 F.2d at 354 (Pet. App. 13a-14a).

Finally, the minority enhancement credit policy involves individualized consideration of each applicant that seeks credit for minority ownership. Opportunity is available for the Commission, as well as for competing applicants, to test the proposals of an applicant seeking credit for minority ownership to ensure, for example, that the applicant is bona fide.[43] As part of this individualized consideration, credit is given for minority ownership only where the minority owner will devote "substantial amounts of time on a daily basis" to the management of the station. *1965 Policy Statement*, 1 F.C.C.2d at 395. Thus the weight given to minority ownership in a comparative proceeding bears a direct relationship to the extent to which those owners are involved in management of the station on a day-to-day basis and can be expected, as a result, to have an impact on the station's programming.

B. A Nexus Between Ownership And Programming Has Been Established.

The Court has sustained as rational the Commission's conclusion "that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *FCC v. NCCB*, 436 U.S. at 796. The conference report for the 1982 lottery legislation stated that the "nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." H.R. Rep. No. 765 at 40. The Senate report for the FCC's appropriations bill in 1987 reiterated this conclusion,

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[43] Applications that are deemed to involve sham arrangements in which the minority owner is found, in fact, not to be what he or she purports to be, have been rejected by the Commissions. *See, e.g., KIST Corp.*, 102 F.C.C.2d 288, 292 (1985), *aff'd, mem., United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir.1986); *Tulsa Broadcasting Group*, 2 FCC Rcd at 6129-30.

stating that "[d]iversity of ownership results in diversity of programming." S. Rep. No. 100-182 at 76.[44]

Race has been recognized as a relevant factor in considering a speaker's potential to contribute to diversity. *Bakke*, 438 U.S. at 311-19 (Powell, J.). In the broadcast context, the Court has indicated that the FCC was justified in proceeding on the premise that the employment of minorities at broadcast stations, which the FCC expected would include their participation in programming decisions, would have a beneficial impact on broadcast programming "by ensuring that [it] fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. at 670 n.7.

The relevance of race in pursuing the goal of diversity was also supported by the Kerner Commission:

> The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he now calls the "white press" —a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society. . . . The absence of Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers and sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American.

Kerner Commission Report at 203. A decade later, the United States Commission on Civil Rights endorsed this view, summarizing that the Kerner Commission had "concluded that a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks. A similar conclusion could be drawn in regard to other racial and ethnic minorities . . . ." United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television* 2 (1977).

Testimony in congressional hearings concerning minority participation in the broadcasting industry has echoed the same themes:

> [T]he importance of minority ownership is clear. Minorities need to have a voice that speaks to them, for them and about them. Black owned radio and television stations are not afraid to push voter registration. Black owned broadcast stations are not afraid to talk about South Africa. In particular, black owned radio stations give black politicians a chance to be heard. Black people listen to black radio. Because black radio stations still subscribe to the concept of operating in the public interest. Black radio is local. It's the church program on Sunday, it's the community school, it's the forum for issues that many non-minority owned radio owners would consider too "sensitive," too "one issue oriented" or "not sexy enough."

Hearings on H.R. 5373 at 164-65 (statement of Jesse L. Jackson).

There is, of course, "no *guarantee*" that minority ownership will produce a result in terms of a station's programming any different from that which would occur absent a minority owner. *See Shurberg*, 876 F.2d at 944 (Wald, C.J., dissenting) (emphasis in original). Congress, however, could reasonably conclude that an increase in the ownership of broadcast stations by sig-

[44] The appropriations bill terminated an inquiry, which, as noted earlier, the Commission had begun in 1986 to examine whether *it* had established an adequate factual basis, in light of its then understanding of developing legal standards governing race-conscious policies, for a determination that there exists "a nexus between minority/female ownership and viewpoint diversity . . . ." *Notice of Inquiry*, 1 FCC Rcd at 1317. *See* p. 13 above. The Senate Report stated that "the inquiry is unwarranted" in light of Congress' repeated findings that such a nexus does exist. S. Rep. No. 100-182 at 76.

nificant, but severely underrepresented, groups would increase diversity on the broadcast airwaves.[45]

C. Adoption Of The Policy Followed Implementation Of Alternative Methods Of Addressing The Lack Of Minority Ownership That Proved Inadequate.

The Court in other contexts has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. *See Croson*, 109 S.Ct. at 728; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *id.* at 511 (Powell, J.). In this regard, the FCC for many years followed policies of encouraging diversity of ownership *without* consideration of race, i.e., it sought to minimize concentration of control of broadcast stations and thus maximize the opportunities for individuals or organizations to control stations. *See* pages 3-5 above. As indicated earlier, despite following such policies for several decades, minorities remained severely underrepresented in the ownership of broadcast stations. Moreover, the minority enhancement credit was adopted after the FCC specifically found that equal employment opportunity rules and ascertainment policies alone were insufficient to accomplish significant minority participation in programming. *See 1978 Minority Policy Statement*, 68 F.C.C.2d at 981; *Random Selection/Lottery Systems*, 88 F.C.C.2d 476, 489-90 (1981).

The FCC had already taken a number of actions specifically addressed to entry barriers that had been identified as impeding minority ownership before Congress acted in 1987 to compel the minority enhancement credit and other race-conscious policies. For example, the minimum showing necessary to demonstrate financial qualifications to receive a radio or television station license was reduced in order to lower this barrier to minority

[45] Even where a statute is analyzed under a strict scrutiny standard of review, the statute can be sustained on the basis of reasonable congressional findings and conclusions. *Fullilove*, 448 U.S. at 496, 503 n.4 (Powell, J.).

applicants.[46] In addition, the Commission adopted procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations.[47] The Commission also has taken steps to increase the total number of radio and television stations, thus increasing the opportunities for minorities to enter the broadcast industry.[48] Despite these substantial initiatives not involving racial considerations, the Commission and Congress concluded that the "'dearth of minority ownership' in the telecommunications industry" continued to be a "serious concern." *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 852 (1982); H.R. Rep. No. 765 at 43-44; S. Rep. 100-182 at 76.[49]

[46] Section 308(b) of the Communications Act, 47 U.S.C. 308(b), authorizes the FCC to elicit information from applicants regarding their financial qualifications to operate a station. The Commission had required applicants to demonstrate the availability of sufficient funds to construct and operate the station for one year. *See Ultravision Broadcasting*, 1 F.C.C.2d 544 (1965). This requirement was identified by the Minority Ownership Task Force as one of the barriers to increased minority ownership. *See Minority Task Force Report* 11-12. The requirement subsequently was reduced to three months. *See New Financial Qualifications for Aural Applicants*, FCC 78-556 (Aug. 2, 1978); *New Financial Qualifications Standard for Broadcast Television Applicants*, FCC 79-299 (May 11, 1979).

[47] *See* FCC EEO-Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* 8-9 (Dec. 1979) (describing agency establishment of "a listing of minority persons interested both in purchasing broadcast stations and in making themselves known to broadcast station sellers and brokers").

[48] *See, e.g., Availability of FM Broadcast Assignments*, 101 F.C.C.2d 638 (1985), *reconsid. granted in part and denied in part*, 59 Radio Reg.2d (P&F) 1221 (1986), *aff'd, National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987); *Clear Channel Broadcasting in the AM Band*, 78 F.C.C.2d 1345 (1980); *Low Power Television Service*, 51 Radio Reg.2d (P&F) 476 (1982), *reconsid. granted in part and denied in part*, 53 Radio Reg.2d (P&F) 1267 (1983).

[49] Petitioner's claim (Pet. Br. at 39) that the FCC "believes [diversity] already has been, and is being, achieved" is mistaken insofar as it suggests a determination by the FCC that some op-

The range of available alternatives for increasing minority participation in broadcast programming is limited. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), for example, provides that a broadcaster "shall not . . . be deemed a common carrier." The Court has held that "consistently with the policy of the Act to preserve editorial control of programming in the licensee," Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (footnote omitted). The Court, moreover, has made clear that "the important purposes of the Communications Act" to preserve for broadcasters a high degree of editorial discretion and to minimize governmental control over broadcast content are "grounded in the First Amendment." *FCC v. League of Women Voters of California*, 468 U.S. 364, 379-80 (1984) (footnote omitted), *citing CBS, Inc. v. DNC*, 412 U.S. at 94, 110, 126. Given the limitations on its authority in this area, the FCC has traditionally sought to promote diversity by structural regulations, of which the minority enhancement credit is one example, " 'without on-going government surveillance of the content of speech.' " *FCC v. NCCB*, 436 U.S. at 801-02; *see also id.* at 780-81 and nn.1-3.

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timal level of program diversity in broadcasting has been achieved rendering any further efforts to promote diversity unnecessary. Petitioner relies on language from the FCC's radio deregulation proceeding in which the Commission held that detailed regulation of licensees' operation of their stations was no longer necessary. *See Deregulation of Radio*, 84 F.C.C.2d 968, 1066 (1981), *on reconsid.*, 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C.Cir. 1983). The FCC did not, however, eliminate much of its detailed regulation of radio because it concluded that fostering program diversity was no longer an important part of its regulatory mission, but rather because it concluded that those particular regulations were no longer necessary and were counterproductive. *See* 84 F.C.C.2d at 977-83, 1067-68. Significantly, the Commission emphasized that it was not eliminating the minority ownership policies. *Id.* at 977. *See also* n.25 above.

Even where structural regulations are concerned, the FCC's steps to promote diversity have been limited by important countervailing public interest considerations. "[B]oth the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." *FCC v. NCCB*, 436 U.S. at 805-06 (citations omitted). The renewal expectancy policy, however, severely limits minorities' ability to compete for existing, established stations, which occupy the overwhelming majority of available broadcast frequencies.[50]

Based on the Commission's experiences and the nature of the broadcasting industry, Congress could reasonably conclude that the minority enhancement credit is an appropriate and limited method of enhancing minorities' ability to enter the broadcast industry without undermining the important goal of stability in the industry and without, as shown below, significantly harming nonminorities. "In no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480 (plurality opinion) (citation omitted).

Chief Justice Berger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment." 448 U.S. at 489 (footnote omitted). The same can be said of the minority enhancement credit. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. Congress has twice ordered the program extended on a yearly basis.

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[50] As noted above (*see* n.48), the Commission has sought, as part of its overall efforts to promote minority ownership, to make available new allocations of radio and television stations, including new services such as low power television, for which minorities can compete without having to overcome an incumbent licensee's renewal expectancy.

See n.8 above. Moreover, as the Court held in *Johnson v. Transportation Agency*, 480 U.S. at 639-40, "[e]xpress assurance that a program is only temporary may be necessary only if the program actually sets aside positions according to specific numbers." As noted earlier (p. 40 above), the minority enhancement policy sets aside no minimum number or percentage of licenses for minority applicants.

D. The Policy's Impact On Nonminorities Is Minimal.

We do not contend that a Congressionally-enacted race-conscious program in which a benefit is awarded on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The minority enhancement credit, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case, or more generally, from the perspective of all nonminorities interested in entering the broadcast industry.

When a race-conscious policy involves entry into employment, rather than layoffs of established employees, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-83 (Powell, J.); *id.* at 294-95 (White, J.). FCC comparative licensing proceedings are directly analogous to entry into employment rather than layoffs. In such employment entry situations, the Court has held that applicants have no settled expectations to be hired. The proceeding below, like virtually all proceedings in which the minority enhancement credit would be applicable, involved competing applicants for a license to construct a new broadcast station, all of whom were qualified to be licensees.[51] The FCC's respon-

[51] The minority enhancement credit theoretically could be applied in a comparative *renewal* proceeding, in which a new applicant seeks to compete against a renewal applicant for a license to operate a station. However, because of the renewal expectancy that is ordinarily earned by a renewal applicant (*see* p. 47 above), the likelihood that a comparative renewal proceeding would turn on the minority enhancement credit is remote.

sibility is to grant licenses in the "public interest, convenience and necessity." 47 U.S.C. 307, 309. Applicants thus have no settled expectations that their application will be granted without consideration of public interest factors such as the minority enhancement credit. The Court has held, for example, that there is "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." *FCC v. NCCB*, 436 U.S. at 799. The Court should find here that the fifth amendment also does not prevent promotion of the public interest in diversity through the limited tool of the minority enhancement credit. *See Shurberg*, 876 F.2d at 951 (Wald, C.J., dissenting) (Distress sale policy "can hardly be said to disrupt settled expectations of potential licensees."); *Johnson v. Transportation Agency*, 480 U.S. at 638 ("[P]etitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner.").

Chief Justice Burger stated in *Fullilove*, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484, *quoting Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). *See also Wygant*, 476 U.S. at 280-81 (Powell, J.) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1990

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* The Acting Solicitor General has authorized the filing of this brief in order for the Court to have the benefit of the views of the Commission. The views of the United States will be expressed in a brief filed by the Acting Solicitor General.

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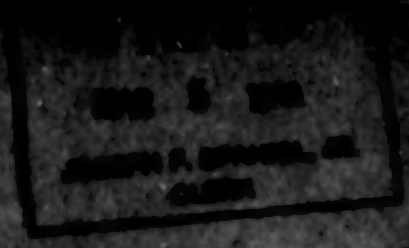

No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERVENOR
RAINBOW BROADCASTING COMPANY

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QUESTION PRESENTED

Whether the Commission's congressionally mandated consideration of broadcast applicants' minority status as one enhancing factor in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERVENOR RAINBOW BROADCASTING COMPANY

STATEMENT OF THE CASE

The Commission Proceeding

This case arises from a decision of the Federal Communications Commission authorizing a new UHF television station on Channel 65, Orlando, Florida. In 1983, three mutually exclusive applications were filed for the Orlando facility by the petitioner, Metro Broadcasting, Inc.; the respondent intervenor, Rainbow Broadcasting

Company; and Winter Park Communications, no longer a party. After evidentiary hearing, a Commission administrative law judge issued an initial decision finding Rainbow unqualified and granting Metro's application. Pet. App. 2a-4a, 88a-90a.

The Commission's Review Board reversed that decision, holding Rainbow qualified and comparatively superior. Pet. App. 64a-93a. The "general evaluative framework" governing that comparison is set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 604 (D.C. Cir. 1984), *cert denied*, 470 U.S. 1027 (1985). The comparison, summarized by the *West Michigan* court at 735 F.2d 604-607, seeks to achieve "maximum diffusion" of station ownership and "best practicable service to the public," *Policy Statement, supra*, 1 F.C.C.2d 393, 394, by evaluating competing applications against six factors. The first, diversification of control of mass media, assesses other media holdings of applicants, assigning the greatest credit to an applicant with no ownership interest in any medium of mass communication. Id., at 393-394.[1] The second, full time owner participation in station management ("integration of ownership and management"), *id.*, at 395, involves two categories of comparative credit, the second contingent upon receipt of the first. Applicants receive "quantitative" integration credit equal to the percentage of their ownership proposing to work at the station full time (sharply reduced credit is awarded for substantial but less than full time integration), with degree of credit

[1] Diversification "has been viewed by the Commission as 'a factor of primary significance' in determining who among competing applicants in a a comparative proceeding should receive the initial license for a particular broadcast facility." *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 781 (1978)(quoting from the *Policy Statement, supra*).

also influenced by significance in policy and management terms of the staff jobs to be held. *Ibid.*

If and only if quantitative integration credit has been given, applicants may also receive additional credit directly proportional to the percentage of their quantitative integration, *Debra D. Carrigan*, 104 F.C.C.2d 826, 833 (1986), for various enhancing attributes.[2] The *Policy Statement*, 1 F.C.C.2d, at 395-396, identifies local residence, broadcast experience and past participation in local civic affairs. Pursuant to the *Policy Statement's* promise of "changes in policy [when] deemed appropriate," *id.*, at 399, the minority enhancement was subsequently added to these factors, *see WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978), as was a similar but "lesser" enhancement for female ownership, *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).[3]

In the comparative evaluation here, Rainbow was awarded 90% quantitative integration credit for the full time participation of its 85% owner, Joseph Rey and 5%

[2] These attributes cannot overcome a clear quantitative difference, *Committee for Community Access v. F.C.C.*, 737 F.2d 74, 81 (D.C. Cir. 1984); the Commission has found a 12.5% differential to constitute a "decisive" quantitative advantage, *New Continental Broadcasting Company*, 88 F.C.C.2d 830, 850 (Rev. Bd. 1981), *reconsideration denied*, 89 F.C.C.2d 631 (1982), *reopened and remanded on other grounds*, 98 F.C.C.2d 301 (1984).

[3] The *Policy Statement's* third and fourth factors, considered only upon appropriate prehearing showing and not here relevant, permit credit for program proposals demonstrating "superior devotion to public service," 1 F.C.C.2d, at 397, and credit or discredit for "unusually good or unusually poor" records compiled by stations owned by an applicant, 1 F.C.C.2d, at 398. The fifth factor credits applicants for engineering characteristics of their applications making for more efficient use of the frequency, 1 F.C.C.2d, at 398; and the sixth factor, licensee character, is considered only as a disabling negative, 1 F.C.C.2d, at 399.

owner Esperanza Rey-Mehr, whereas Metro was awarded credit for 79.2% full time participation and 19.8% part time participation. Metro received more qualitative enhancement credit for past local residence, Rainbow more for integrated minority ownership and broadcast experience. Only Metro received civic participation credit, only Rainbow received female enhancement. Overall, the Review Board concluded that Rainbow's substantial preferences for broadcast experience and minority ownership and its preference for 5% female ownership outweighed Metro's moderate local residence and civic activities preferences. On the basis of its quantitative and qualitative integration edge, Rainbow was comparatively preferred. Pet. App. 88a, 90a.

The Commission denied review, Pet. App. 60a, and the Review Board's decision became the final agency decision under 47 U.S.C. § 155(c)(3). In denying review, the Commission noted that even if Metro had been granted a "substantial" preference for local residence instead of a "moderate" one and even if Rainbow had been given no credit for its 5% female ownership, the outcome of the case would not have been changed. Pet. App. 61a.

The losing applicants filed appeals from the Commission's decision with the Court of Appeals for the District of Columbia Circuit.

Subsequent Proceedings

After the case had been briefed in the Court of Appeals and prior to oral argument, the Commission initiated a rulemaking proceeding to explore its constitutional and statutory authority to award comparative preferences based on race or sex. ***Reexamination of Racial, Gender or Ethnic Classifications***, 1 FCC Rcd 1315 (1986). Based upon the initiation of this Inquiry, the Commission requested and received remand of this

proceeding. Pet. App. 58a. Upon remand the Commission concluded that Rainbow's quantitative integration advantage over Metro "might not be considered dispositive in this case" and that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case." Pet. App. 56a-57a. The proceeding was accordingly held in abeyance pending the outcome of the Inquiry. Pet. App. 57a.

However, the Inquiry was terminated by enactment of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (Pet. App. 100a), which prohibited further consideration of the question by a proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, *as amended*, [52] R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension [of] any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.[4]

[4] Essentially identical provisions have been enacted by the Congress and signed by the President for all subsequent fiscal years. See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 101a) and Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 988 (1989) (App. 1a).

In compliance with the Continuing Appropriations Act, the Commission terminated the *Inquiry* without making any findings or conclusions and ordered reinstatement of its comparative licensing policies regarding race, ethnicity and gender preferences as they had existed prior to September 12, 1986. *Reexamination of Racial, Ethnic or Gender Classifications* 3 FCC Rcd 766 (1988). By *Order* dated February 16, 1988, the Commission reactivated the instant proceeding and reinstated the Review Board's decision granting the application of Rainbow Broadcasting Company. Pet. App. 48a. The proceeding was returned to the Court of Appeals and the earlier appeals reinstated and rebriefed.

The Court of Appeals Decision

The Court of Appeals held that "the legality of the FCC's use of a qualitative enhancement for minority ownership... is controlled by our decision in *West Michigan*, 735 F.2d 601, [that] exactly the same policy 'easily passes constitutional muster,' *id.* at 613...." Pet. App. 10a.[5]

In *West Michigan*, the court noted that minority status is "but *one factor* in a competitive multifactor selection system that is designed to obtain a diverse mix of broadcasters" and that the Commission's action "came on the heels" of a congressional finding, made in conjunction with the adoption of minority preferences in licensing lotteries, that the "extreme underrepresentation of minorities and their perspectives in the broadcast mass media

[5] The Court of Appeals declined to consider the validity of the Commission's female enhancement policy because the Commission had determined that the outcome of the proceeding would be unchanged if Rainbow were not given credit for its 5% female integration. Pet. App. 10a n.5. The validity of the Commission's female preference is accordingly likewise not before this Court.

... was a part of 'the effects of past inequities stemming from racial and ethnic discrimination' H.R. Conf. Rep. No. 97-765, 97th Cong., 2nd Sess. 43 (1982), U.S. Code Cong. & Admin. News 1982, p. 2287." *West Michigan Broadcasting Co. v. F.C.C.*, *supra*, 735 F.2d 601, 613-614. Thus, the *West Michigan* court reasoned, "Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure." *Id.*, at 614.

In this case the court below concluded that the constitutional framework of *West Michigan* was unimpaired by this Court's subsequent decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), because *West Michigan* relied upon *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which the *Croson* court continued to consider good law, and *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978)(plurality opinion), whose reasoning that racial diversity constitutes a "constitutionally permissible goal, independent of any attempt to remedy past discrimination," found no disagreement in *Croson*. Pet. App. 13a. The court concluded (Pet. App. 13a-14a) that *Croson*'s two grounds for distinguishing *Fullilove* (*see* 109 S. Ct. 706, 718-720, 723-724), also distinguish *Croson* from this case. First, *Croson* involved an unyielding racial quota and *Fullilove* a flexible 10% set-aside: "The FCC's policy, however, is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." Pet. App. 13a-14a. Second, *Croson* involved enactments of state or local governments as opposed to enactments of the Congress, whose broad remedial powers under § 5 of the fourteenth amendment were at issue in *Fullilove* as well as this case. Pet. App. 14a. Congress, the court noted, "has interceded

at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses." *Id.*

A dissent by Judge Williams reflected his view that *Croson* requires application of a "strict scrutiny" standard to all race-based decisions and that the Commission's diversity of programing standard cannot be equated with the diversity of educational admissions policy of *Bakke*, 438 U.S., at 311-312 (Powell, J.). Pet. App. 20a-21a. The dissent interpreted "program diversity" as meaning race is a predictor of particular programing. Having thus defined diversity, the dissent characterized it as constituting "precisely the racial stereotyping that the *Croson* majority defined as the central evil in the use of race-based decision criteria." Pet. App. 22a. In the dissenter's opinion, *Croson* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) "have toppled *West Michigan*'s constitutional validation of the program diversity theory," Pet. App. 33a, and *Croson* "leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences," Pet. App. 41a. Even if this "ambiguity" were resolved in favour of the minority enhancement policy and it were not deemed a quota or a policy placing an undue burden on non-minority applicants, Judge Williams would nevertheless find the policy deficient for failure "to consider alternative non-racial solutions and the omission of a waiver provision." Pet. App. 45a.

Development Of The Commission's Minority Enhancement Policy

The Commission and the Courts

The Commission's exclusive authority to license radio and television stations in the United States derives from

the Communications Act of 1934, 47 U.S.C. §§ 301, 303, 307. The Act requires that all applicants possess basic qualifications to be licensees but leaves to the Commission the duty to define the specific requirements by regulation.[6] When mutually exclusive applications are filed, the Commission is required to hold an evidentiary hearing to determine, on a comparative basis, which applicant would best serve the public interest, convenience and necessity. 47 U.S.C. § 307; *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945).

Over the years, the Commission has developed criteria for evaluating the comparative merit of mutually exclusive applications. In codifying the general framework for comparative decisions, the *Policy Statement, supra,* 1 F.C.C.2d, at 399, promised that it did "not intend to stultify the continuing process of reviewing our judgment on these matters" and that changes in policy would continue to be made as "appropriate", a promise fulfilled with adoption of the policy at issue here.

In 1968, in response to the adoption of the 1964 Civil Rights Act and the *Report of the National Advisory Commission on Civil Disorders* (1968) (*Kerner Commission Report*),[7] the Commission began instituting licensee obligations aimed at increasing the very limited participation of minorities in the broadcasting industry. Five times

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[6] 47 U.S.C. § 308(b) states in pertinent part that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station. . . ."

[7] In 1968 the Kerner Commission cautioned that "the media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed." *Kerner Commission Report, supra,* 203.

in the following decade, the Commission sought, through increasingly stringent employment, affirmative action and ascertainment requirements, to encourage increased minority participation in broadcasting.[8]

In 1973, in *TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the D.C. Circuit ruled minority ownership a relevant comparative factor related to the Commission's appropriate interest in ensuring "broader community representation and practicable service to the public" and the "diversity of ownership of the mass media and diversity of ideas and expression required by the First Amendment." *Id.*, at 937 & n.26 (citing *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 n.36 (1971)). The court held the "reasonable expectation" that minority ownership would "increase diversity of content" a proper basis for award of credit. *Id.*, at 938. These rulings were reaffirmed two years later, in *Garrett v. F.C.C.*, 513 F.2d 1056 (D.C. Cir. 1975), in which the court found the minority status of an owner operator an appropriate factor for consideration in the context of a request for waiver of a technical signal coverage rule.

After the decisions in *TV 9* and *Garrett*, the Commission began giving affirmative comparative consideration to minority ownership as an enhancement or plus factor when proposed in conjunction with active station management participation. *See WPIX, Inc.*, 68 F.C.C.2d 381,

[8] *Nondiscrimination in Employment Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969); and *Nondiscrimination in Broadcast Licensee Employment Practices*, 13 F.C.C.2d 766 (1968); *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976)..

411-412 (1978). Also in 1978, the Commission conceded defeat in its 10 year effort to affect the historic underrepresentation of minorities in the broadcast industry through indirect means. It was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 (1978) (footnotes omitted).[9]

> This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communictions Act of 1934, but also of the First Amendment.
>
> Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of

[9] The Commission had available considerable documentary evidence of minority exclusion compiled by various industry and government agencies. *See, e.g.*, United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978) (less than 1% minority control of 8500 broadcast stations); United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort-1974, vol. 1 (1974) (33 minority owned radio stations out of 7,000 licensed; no minority owned television station out of 1,000 licensed); United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort-1971 (10 minority owned radio stations out of 7,500 licensed; no minority owned television station out of 1,000 licensed).

fostering the inclusion of minority views in the area of programming.

Id., at 980-981.

In *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), as already noted (see pages 6-8, above), the minority enhancement policy was upheld against the same equal protection challenge here leveled. The court (735 F.2d, at 612-616) found the policy to be both congressionally approved[10] and constitutionally sound within the holdings of *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Congressional Action

The Congress has repeatedly endorsed and affirmatively required the Commission's minority enhancement policy. As early as 1981, Congress enacted an amendment to the Communications Act to permit the Commission to award certain licenses by a lottery or random selection system but required that "underrepresented groups... be granted significant preferences."[11] The following year,

[10] The court found that the Congress had affirmatively approved the preference on diversity grounds and that Section 115 of the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)) represented "congressional confirmation to the factual bases of those policies' remedial nature." Id., at 616.

[11] Communications Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 736-737 (1981). The Commission declined to implement the law on the theory that the requirement of preferences for "underrepresented groups" was so lacking in specificity that any Commission action would be subject to "serious and repeated" legal challenge. *Random Selection Lottery Systems*, 89 F.C.C.2d 257, 279-280 (1982).

Congress enacted another version of the lottery statute and noted the "nexus" between minority ownership and diversity, H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982), while emphasizing the seriousness with which it viewed the "severe underrepresentation of minorities in the media of mass communication" which had resulted from "past inequities stemming from racial and ethnic discrimination". H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). The Report makes clear that Congress chose the minority preferences as an appropriate way of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communication, while promoting the primary communications policy of objective of achieving a greater diversification of the media of mass communication." *Id.*, at 44.

In 1986, when the Commission initiated its Inquiry into the continued validity of its minority and female preference policies, *Reexamination of Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), the Congress enacted the first of a series of legislative actions which required the Commission to terminate Docket No. 86-484 and reinstate its minority ownership policies, including the minority enhancement policy. Continuing Appropriations Act for Fiscal Year 1988, *supra* (Pet. App. 100a).[12]

The Congress' legislative approval and requirement of the minority enhancement policy has been the result of

[12] This congressional requirement has twice been reenacted and continues in force. See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); *see also* S. Rep. No. 144, 101st Cong., 1st Sess. 64 (1989); S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

extensive and continuing legislative fact finding and oversight. Over a period of almost a decade, Congress has held numerous hearings involving the lack of minority broadcast station owners.[13]

SUMMARY OF ARGUMENT

I

Maximizing the number and variety of broadcast voices available to the listening public is the primary objective of the Commission's licensing policy. This Court has approved the Commission judgment that diversity of programming results from diversified station ownership. The almost total absence of minority broadcast voices and the consistent, long term failure of less direct regulatory efforts to increase minority station ownership justified the Commission's decision to make minority status one of several subordinate comparative licensing factors enhancing the credit awarded to applicants proposing to be integrated into daily station management. The minor and variable weight of the

[13] *See, e.g.*, Minority Ownership of Broadcast Stations: Hearings Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation, 101st Cong., 1st Sess. 17-19, 75-77 (1987); Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations, 100th Cong., 1st Sess. 17-19, 75-77 (1987); Minority Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986); Minority Participation in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983).

enhancement as one of several in a changing mix ensures flexibility in its case by case application and the Commission's expressed intent and statutory obligation to alter policies as circumstances change ensure that it will not outlive the public need to which it responds. The constitutional imperative underlying the diversity goal and the risks of censorship implicit in programmatic efforts to diversify broadcast speech lend further support to the Commission's expert judgment that the minority enhancement policy is a necessary response to an intractable problem.

II

Whether the minority enhancement policy is considered as a First Amendment driven quest for diversity or in the more familiar fourteenth amendment/equal protection idiom of an effort to remedy the historical exclusion of minorities from broadcasting, the ultimate victim of exclusion and beneficiary of diversity is the listening public. Viewed in either light the policy survives equal protection review. It must be viewed as an act of Congress employing racial or ethnic criteria and thus mandating close examination even in the remedial context to ensure that its objectives are within the power of Congress. Both the diversity and the remedial objectives are clear, based on an extensive record and well within the comprehensive remedial power of Congress. *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980). The policy is narrowly tailored to meet either of its objectives. It responds to a demonstrated need for inclusion of minorities and a demonstrated failure of race neutral means. Its "plus factor" approach is the most modest possible and any minimal burden imposed on nonminority applicants reflects only the shared cost of eradicating discrimination.

ARGUMENT

I. THE MINORITY ENHANCEMENT POLICY IS A CONSTITUTIONALLY LEGITIMATE EXERCISE OF THE COMMISSION'S JUDICIALLY APPROVED STATUTORY MANDATE TO ADVANCE THE COLLECTIVE FIRST AMENDMENT RIGHT OF THE VIEWING AND LISTENING PUBLIC TO PROGRAMING FROM DIVERSE SOURCES.

The Commission's minority enhancement policy holds that given the severe underrepresentation of minorities in broadcast ownership, the public benefits found to inhere in local station ownership and management are enhanced if local owner-managers include members of minority groups because such operations have the potential to increase the diversity of programing available to the listening public. The petitioner's equal protection challenge to the policy wrenches it from its necessary legal and factual context and analyzes it by reference to regulatory contexts in which it finds no parallel, thus fatally distorting the focus of the comparative licensing process and ignoring the constitutional imperative on which the policy rests. The general breadth of the Commission's discretion; the narrow focus and minor role of this licensing policy in the exercise of that discretion; and the demonstrated and irreplaceable contribution of the policy to the preservation of First Amendment values which is the Commission's unique mandate, suffice to establish that in adopting the challenged enhancement policy the Commission has stayed well within the constitutional limits of its power.

A. The Constitutional Propriety Of The Minority Enhancement Policy Must Be Assessed In Light Of The Origin And Purpose Of Commission Regulation.

A valid constitutional analysis of the challenged policy must take as its starting point the root of the Commis-

sion's authority in the Congress' commerce power and its intended purpose of providing "government supervision over economic enterprise." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141, 142 (1940). Given this origin and purpose, the Commission was delegated "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims," requiring it to "initiate inquiry" and "control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of... the whole nation in the enjoyment of [communications] facilities ...." *Id.*, at 142-143.

The Commission's power, then, is not akin to the "reviewing power... conferred upon the courts under Article III," *id.*, at 141, and "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication," id., at 138. Rather, the Commission's is the "plenary" power of an expert body "to formulate and implement" policy in its mandated area of expertise, a power which carries with it the discretion, where dictated by that mandate, to adopt a race conscious policy such as this one. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); NAACP v. F.P.C., 425 U.S. 662, 670 n.7 (1976); *see Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978)(opinion of Powell, J.).

B. The Judgment That The Minority Enhancement Policy Is Essential To Promotion Of The Commission's Diversity Objective Was Well Within The Bounds Of Commission Discretion.

The Communications Act "puts upon the Commission the burden of determining the composition of [broadcast] traffic" subject to the "criterion" of "the 'public interest, convenience, or necessity.'" *National Broadcast-*

ing Co. v. United States, 319 U.S. 190, 216 (1943). "The 'public interest' to be served under the Communications Act is... the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)." *Id.*

Central to the effectuation of this mandate has been "the Commission's goal of promoting diversity in radio programming." *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981). "In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 776, 780 (1978). "This Court has approved of" that goal and recognized that "the Commission is... vested with broad discretion in determining... what policies should be pursued in promoting it." *F.C.C. v. WNCN Listeners Guild, supra*, 450 U.S. 582, 600.

The minority enhancement policy reflects the Commission's judgment that "[a]dequate representation of minority viewpoints in programming... enriches and educates the non-minority audience" and "enhances the diversified programming which is a key objective... of the Communications Act [and] the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978). Its adoption followed years of less direct efforts to encourage minority broadcast entry, which left minority licensees essentially absent from the ranks of station owners. See *supra*, pages 9-11, 14 n.13; *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 603 n.5 (D.C. Cir.), *cert. denied*, 470 U.S. 1027 (1985).

The decisions of this Court have long and consistently made clear that "the First Amendment... values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. 'The "public interest" standard necessarily invites reference to First Amendment principles,' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources,' *Associated Press v. United States*, 326 U.S. 1, 20 (1944). See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 385, 390 (1969). See also *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-669, & n.27 (1972)(plurality opinion)." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, 436 U.S., at 795.

C. The Minority Enhancement Policy Addresses An Imbalance In Industry Ownership Patterns By Assigning Minor Additional Comparative Credit For The Greater Service To The Public Potentially Available From Minority Owner Managers.

The Commission's comparative licensing proceedings have been governed from the outset by the principle that "[t]hose who give the least [service] must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not... the individual broadcaster...." *Second Annual Report*, Federal Radio Commission, 1928, pp. 169-170 (quoted in *Pottsville, supra*, 309 U.S., at 138 n.2). Thus the Commission has sought so to select and regulate its licensees as to ensure that they provide the public that "access to social, political, esthetic, moral, and other ideas and experiences" which is its "collective right," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Consistent with this controlling formulation, the Commission's minority enhancement policy assigns an affirma-

tive public interest value to applications which would bring the public the previously unheard voices and perspectives of minority broadcasters. The policy makes no change in the focus of the comparative licensing process; it simply adds one more yardstick against which to measure the potential value to the public of the service proposed by competing applicants, thus broadening rather than narrowing the basis for choice.

The Commission weighs competing applications in light of applicants' other media holdings; proposed full time station management roles ("quantitative integration"); proposed programing demonstrating "superior devotion to public service"; "unusually good or unusually poor" past ownership records; technical engineering attributes; and disabling character flaws. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-399 (1965); see *supra*, pages 1-4. Applicants receiving quantitative integration credit are also entitled to proportional "qualitative" credit for attributes enhancing the value of their integration, including past and prospective local residence, civic participation, past broadcast experience and, for well over a decade now, the minority status of applicants proposing integration.

In this case, only integration of ownership offered a sufficient basis for preference. Rainbow was credited with integrating 90% of its ownership into full time station management, Metro with 79.2% (plus minor part time credit). Pet. App. 86a. While the Commission's Review Board deemed Rainbow's quantitative advantage "probably" dispositive, Pet. App. 87a, Rainbow also prevailed in the assessment of enhancements. Pet. App. 81a-82a, 87a-88a. Both applicants received credits of varying degree and attached to various percentages of ownership for past local residence, future local residence, broadcast experience and minority ownership; Metro also received some civic activity credit and Rainbow slight credit for a

5% integrated female owner. Weighing all these merits in the balance, the Review Board concluded that Rainbow's "somewhat outweigh[ed]" Metro's. Pet. App. 88a. Given its "edge" on both quantitative and qualitative integration, Rainbow received a "slight" but ultimately dispositive integration preference. Pet. App. 88a, 90a.

Even as applied in the present close comparative case, it is manifest that the minority enhancement policy is but a small element in a complex decisional process, bearing no resemblance to the "inflexible percentages based solely on race" disfavored by the Court, *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728-729 (1989). No plus factor is a prerequisite to eligibility for the license; this enhancement is but one sub-category of one of six general factors weighed in the selection process. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 317-318 (1978).

Indeed, its subordinate status is built in because its weight is always controlled by the percent of quantitative integration to which it attaches. Here, for example, Metro was defeated not by its lesser minority ownership but by its failure to establish its quantitative integration claim. Even if all of Metro's integrated owners had been minorities, Rainbow would still have received a greater enhancement because it proposed greater ownership integration, a more important credit and one which is both voluntary and non-race based. The actual decisional significance of the minority preference, and thus its potential impact on non-minorities, even in this case, is thus more apparent than real.[14] Its practical effect is

[14] Moreover, while this enhancement opens to minorities an area of credit unavailable to nonminorities, credit is almost as certainly withheld from minority applicants for unusually good broadcast records, since that credit attaches only to the ownership role from which they have been almost entirely excluded.

simply to encourage prospective minority applicants to apply and applicants in general to include members of minority groups among their number, since all applicants attempt to put together applications reflecting as many comparative plus factors as possible—an act of self interest which carries equal public benefit.

Neither in a given case nor generally can the policy serve to rigidify the comparative process. No matter how specifically recited or ranked the decisional factors may be, they are not a mathematical formula and their application is necessarily subjective. The amount of weight given any factor will depend on the unique mix of attributes characterizing the applications in each case. Even within the single factor of integration of ownership, the weight attaching to any subordinate point of preference depends on the size of the ownership interest to which it attaches, the degree to which it exceeds any comparable credit to an opponent and what other enhancements it accompanies.

The flexibility of the criteria from case to case is matched by their flexibility from time to time. The *Policy Statement* notes the Commission's "continuing process of reviewing our judgment on these matters," 1 F.C.C.2d, at 399, and it is implicit in the public interest standard: "In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of [a policy], it must be assumed that the Commission will act in accordance with its statutory obligations." *National Broadcasting Co. v. F.C.C.*, *supra*, 319 U.S. 190, 225. Judicial approval of the minority enhancement policy thus involves no risk of "uphold[ing] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant v. Jackson Board of*

Education, 476 U.S. 267, 276 (1986) (opinion of Powell, J.).

D. Extirpation Of The Minority Enhancement Would Require Radical Reordering Of Settled Constitutional Principles Governing Commission Action.

The Commission's actions are at once constrained and compelled by its unique and perilous First Amendment mandate. "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century," during which the Congress and the Commission "have established a delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The Commission must serve on the one hand as "guardian of the public interest," *id.*, at 117, charged to advance "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), and on the other hand must avoid "the risk of an enlargement of government control over the content of broadcast" speech, *CBS*, *supra*, 412 U.S., at 126.

It is the long standing conviction of the Commission, the Congress and the court charged with review of Commission licensing decisions that the minority enhancement policy is essential to achievement of the Commission's diversity goal. See *supra*, pages 8-14. That being so, any detriment to the private business interests of individual license applicants resulting from application

of the enhancement policy is a matter which cannot be deemed an appropriate counterweight to the public good sought through application of the policy. This is not a case of disadvantaging one category of applicant in order to advantage another;[15] it is rather a situation in which one category of applicant offers a unique benefit entitled to comparative weight. Should that weight in any case prove decisive, then that is simply a case of sacrificing one of "those who give the least" for one of "those who give the most." *See F.C.C. v. Pottsville Broadcasting Co., supra,* 309 U.S. 134, 138 n.2.

It is objected that the Commission's conviction of benefit stands unproven. That is an inadmissible objection. It is the considered judgment of the expert body charged with making judgments in this area that there is a sufficient nexus between diversity of ownership and diversity of programing perspective to warrant the policy. This Court has long "recognized that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations"; that "[i]n such cases complete factual support for the Commission's ultimate conclusions is not required, *F.C.C. v. WNCN Listeners Guild,* 450 U.S. 582, 594-595 (1981); and that the question whether diverse ownership would lead to diversity of viewpoint is precisely such a question, *F.C.C. v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 796-799 (1978). In *NCCB* (at 796-797) the Court also identified the fundamental danger facing any more direct or non-structural approach to achieving the

[15] In this connection it is not without relevance that a license applicant, unlike a job applicant or a candidate for school admission, is a business entity which more often than not includes multiple individuals chosen for their various contributions to an ideal mix, by virtue of where they live, what media interests they hold and so on. Moreover, even the marginal constraints imposed by the policy are limited to a single method of station acquisition.

desired diversity: "As the Court of Appeals observed, 'diversity and its effects are elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'"

In fact, however, there is more at work here than an agency mandate; it is a bedrock principle of our First Amendment jurisprudence and, indeed, our societal pantheon of shared values, that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y.), *affirmed,* 326 U.S. 1 (1945)(Hand, J.). Indeed, it was precisely that assumption of the primary importance of diversity which underlay the judgment of a majority of the Court in *Regents of the University of California v. Bakke,* 438 U.S. 265, 272, 314, 320, 326 & n.1 (1978) that "the interest of diversity is compelling in the context of a university's admissions program."

It is suggested as well that to act on the knowledge that our social, cultural and ethnic backgrounds affect our outlooks amounts to unconstitutional racism. Such an artificial viewpoint both denies us the enjoyment of our differences and pretends away such basic problems addressed by the policy as "a press that...reflects the biases, the paternalism, the indifference of white America," *Kerner Commission Report, supra,* 203. It is, at bottom, a rejection of the 50 year judicially approved quest for program diversity. However, it is also not legal theory but social opinion and accordingly offers no basis for judicial displacement of agency discretion, " 'since Congress has confided the problem to the latter.' *F.C.C. v. WOKO, Inc.,* 329 U.S. 223, 229 (1946). 'Courts should not overrule an administrative agency decision merely because they disagree with its wisdom.' *Radio Corp. of*

America v. United States, 341 U.S. 412, 420 (1951)." *CBS, Inc. v. F.C.C.*, 453 U.S. 367, 394 (1981).

The minority enhancement policy is in the mainstream of Commission regulation. Both the legitimacy and the constitutional and statutory necessity of its diversity objective have been confirmed in decisions of this Court spanning more than half a century. The Commission devoted some 10 years to a varied and unsuccesful effort to reach the same goal through less direct regulations. Notwithstanding the contrary protestations of the petitioner, the policy imposes little if any burden on non-minority applicants and any such burden is no different in effect from that inherent in the comparative process; many well qualified applicants must be denied so that others who better satisfy the public's paramount service needs may be granted.

Finally, what is really challenged here is not an isolated regulation. It is a small but vital segment of a delicate regulatory scheme whose principal function is protection of our collective right to receive "information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). There is no precedent which requires or even suggests the propriety of dismantling that regulatory scheme simply because this policy in literal fact involves a race based classification.

II. THE MINORITY ENHANCEMENT POLICY SATISFIES THE DEMANDS OF PREVAILING EQUAL PROTECTION SCRUTINY WHETHER CONSIDERED IN LIGHT OF ITS UNIQUE FIRST AMENDMENT IMPERATIVE OR ITS MORE TRADITIONAL REMEDIAL PURPOSE.

The minority enhancement policy is an act of Congress. It has enjoyed explicit congressional approval since

1982[16] and in 1987 it was legislatively enacted.[17] In 1982, Congress identified its objectives in endorsing the minority enhancement policy: to further its goal of encouraging greater diversity of programing and viewpoint in broadcasting; and to remedy the historic "severe underrepresentation" of minorities in broadcasting. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). The interrelationship of these two objectives led Congress to conclude that:

> One means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings for the media of mass communications.

Id., at 44. To support the policy under review, it is necessary that at least one of its goals constitute a compelling governmental interest.

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[16] See footnote 10, *supra*. In 1982 the Congress authorized Commission use of a random selection lottery for the awarding of certain licenses, but required that in administering the lottery the Commission must include "significant preferences" for applicants increasing diversification of ownership in general, plus "an additional significant preference" for minority applicants. Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (codified at 47 U.S.C. § 309(i)(3)(A). That remediation of past discrimination as well as diversification was an objective of this legislation is clear from the fact that the preference was to be applied to both content and noncontent communications services.

[17] Pub. L. No. 101-162, 103 Stat. 988 (1989) (App. 1); Pub. L. No. 100-457, 102 Stat. 2216-17 (1988) (Pet. App. 101a); and Pub. L. No. 100-202, 101 Stat. 1329 (1987)(Pet. App. 101a).

A. The Objectives Of The Minority Enhancement Policy Are Within The Power of Congress.

At the outset it is clear that the minority enhancement policy must be viewed as an act of Congress[18] and reviewed as "a program that employs racial or ethnic criteria," a fact which, "even in a remedial context, calls for close examination", *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)(Burger, C.J.). The "close examination" is to determine whether the "*objectives* of this legislation are within the power of Congress," *id.*, at 473. If the answer to the first inquiry is affirmative, the next inquiry is "to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.*, at 473.

Where, as here, an act of Congress is under review, it is the power of Congress that must first be identified. The Communications Act, the statutory vehicle through which Congress has chosen to regulate broadcasting, derives from the Commerce Clause, U.S. Const. Art. I, § 8, *United States v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-143 (1940), and Congress' broad power "to enforce by appropriate legislation" the equal protection guarantees of the fourteenth amendment constitutes the relevant power of Congress, *Fullilove*, at 472.

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[18] While the Congress chose to act through the vehicle of appropriations bills, the resulting action is nevertheless an "act of Congress". *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984). "The reach of the spending power of Congress is at least as broad as the regulatory powers of Congress." *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980).

The congressional objective in endorsing and adopting the minority enhancement policy has been articulated on multiple occasions: in 1982 in conjunction with the adoption of random selection lotteries, Congress found minority preferences "an important factor in diversifying the media of mass communications" and said "that the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in media of mass communication . . . ." H.R. Conf. Rep. No. 765, 2d Sess., 43. In 1987, Congress adopted the first of three appropriations bills requiring the reinstatement and retention of, *inter alia*, the minority enhancement.[19] Pet. App. 101a.

Congress' objectives of furthering diversity of broadcast ownership and increasing minority ownership were clear and well within its power: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove, supra*, 448 U.S., at 483. Although "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings," *id.*, at 478, here Congress had an extensive record of hearings and documentary evidence, demonstrating the "strong basis in evidence for its conclusion that remedial action was necessary," *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).

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[19] *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1989) states: "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences."

B. The Minority Enhancement Policy Is Narrowly Tailored To Achieve Its Objectives.

The minority enhancement policy is narrowly tailored to meet either the diversity or the remedial objective. The Commission adopted the policy only after a number of years of seeking to achieve minority participation through more indirect methods such as expanded equal opportunity rules[20] and license ascertainment requirements[21] proved insufficient. Despite the Commission's decade long effort, the Minority Ownership Task Force in 1978 was still advising the Commission that "unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger non-minority audience will be deprived of the views of minorities. *Minority Ownership Report* 1 (1978).

In addition to the efforts directly related to minority involvement, the Commission has sought to promote new entrants by making new FM radio and low power television frequencies available for new applicants. *See Availability of FM Broadcast Assignments,* 101 F.C.C.2d 638 (1985), *reconsideration granted in part and denied in part,* 59 Rad. Reg.2d (P&F) 1221 (1986), *affirmed sub nom. National Black Media Coalition v. F.C.C.,* 822 F.2d 277 (2d Cir. 1987); *Low Power Television Service,* 51 Rad. Reg.2d (P&F) 476 (1982), *reconsideration granted in part and denied in part,* 53 Rad. Reg.2d (P&F) 1267 (1983). Despite these efforts to use race neutral alternatives,

[20] See note 8, *supra.*

[21] *See Ascertainment of Community Problems by Broadcast Applicants,* 57 F.C.C.2d 418 (1976), which provided extensive and detailed requirements for description of "community leaders" in an effort to require licensees to be responsive to their entire communities, including women and minorities.

minority owners remain severely underrepresented.[22] The fact that such race neutral efforts have been made is relevant to a determination whether race conscious efforts are necessary. *See United States v. Paradise,* 480 U.S. 149, 171 (1987).

While the comparative minority enhancement policy is race conscious, it is in the nature of a plus factor rather than a "quota" or "set aside" and no opportunity is reserved for any minority applicant. It is thus closely analogous to the Harvard plan Justice Powell was prepared to accept in *Bakke,* 438 U.S., at 315-320.

The minority enhancement is available only to applicants in comparative proceedings who have committed to work at the proposed station on a day to day basis. It is a "qualitative" integration factor equivalent to the enhancement given for past and present local residence, civic activities and broadcast experience, each of which is available only to applicants receiving quantitative integration credit. See *supra,* pages 2-3. By making the enhancement one of a number of plus factors and limiting its availability to integrated owners in proportion to their percentage of ownership, the Commission took the most limited action capable of affecting the comparative process.

C. The Minority Enhancement Policy Imposes An Insubstantial Burden on Nonminority Applicants.

A narrowly tailored program need not be the least restrictive means of implementation to be acceptable.

[22] According to the most recent survey data, 3.5% of all radio and television stations in the United States are controlled by minority individuals. The same data indicate that 81 women and minority group members received station licenses in cases where a comparative minority enhancement was awarded. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* 40-41 (1988).

Fullilove, 448 U.S., at 508 (Powell, J.). In the case of the minority enhancement factor, the burden placed on nonminority applicants is minimal. By its terms the enhancement policy is a plus factor that cannot overcome nonracial comparative factors such as full time integration. Moreover, since the preference functions mainly in proceedings involving new station authorizations, any loss by a nonminority is more analogous to "hirings" than "firings," which require stronger justification. *Wygant v. Jackson Board of Education, supra*, 476 U.S., at 282-283 (Powell, J.). The possibility that nonminority applicants may be adversely affected by the policy does not render it improper: "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Id.*, at 280-281.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER METRO BROADCASTING, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988, 1989 and 1990 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

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INTRODUCTORY STATEMENT

Petitioner, Metro Broadcasting, Inc. (Metro), urges this Court to invalidate, by unanimous decision, the race-, ethnic- and gender-based preference classifications employed by the Federal Communications Commission (FCC or Commission) in its comparative licensing process. Such action would not end the efforts of the Commission and Congress to ensure that minorities, females and other underrepresented groups are not unfairly and unlawfully denied access to broadcast facilities. As Metro will show, invalidation of the discriminatory "enhancement credits" awarded under the FCC's "best practicable service" criterion will lead to properly articulated and narrowly tailored policies which encourage female and minority access to broadcast facilities. Nor would invalidation of this preference scheme require the Court to stop all government-sponsored affirmative action plans and revisit its cases in which well-defined and properly-crafted plans were approved. As presently conceived and implemented within the Commission's modern comparative process, the FCC's "enhancement" policies, although ostensibly innocuous and politically expedient, constitute the most egregious and discriminatory government-sponsored behavior since racial segregation in public schools. Both the Commission's "program diversity" objective and its chosen method of diversity promotion, crossed the threshold of permissible race-, ethnic- and gender-based distinctions—under any of the equal protection standards devised by the various members of this Court[1]—many years ago.

Notably, whereas both the FCC, as federal respondent, and the United States Senate, as *amicus curia*, have filed briefs with the Court in this case, neither is eager to claim credit for the race-, ethnic- and gender-based qualitative enhancements or the program diversity rationale which underlies them. The Commission shuns responsibility for the enhancement policies by depicting them as "a deliberate

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[1] *See Metro Brief* at 28-32.

and considered *congressional* choice, *FCC Brief* at 18-27.[2] Similarly, the Senate's Brief stresses the *judicial* and *administrative* origins of the FCC's minority and female preference policies[3]—its main focus is upon *other* policies devised by Congress to increase *minority ownership*,[4] rather than to foster program diversity.[5] The record does not indicate that Congress lauds the policies as effective or uniquely desirable. What is clear is that the Commission and Senate, like the the court of appeals which instituted the policies[6] apparently have *perpetuated* them based upon a "herd instinct" that congressional support for the preferences exists or may be inferred; a "belief" that the burdens imposed upon non-minorities and males by the classifications em-

[2] Moreover, the Commission's own apparent support for its race-, ethnic-and gender based preference classifications must be assessed in light of codified congressional restrictions on the views the Commission is free to express. *See Metro Brief* at 16-19.

[3] *Senate Brief* at 11.

[4] The objective underlying the Commission's race-, ethnic- and gender-based classification policies is and always has been the achievement of *program diversity*, rather than the promotion of *minority ownership per se*. *See Metro Brief* at 37. *See also FCC Brief* at 27-32. This distinction is important because only the actual goal of program diversity, rather than other goals which the Commission *could* have adopted, is under review by this Court. Metro contends that the Commission's choice of program diversity as the goal underlying its classification scheme is largely responsible for the poor crafting of the Commission's preferences and their discriminatory impact upon minorities, females, non-minorities and males alike. *See discussion* at p. 3, *infra*.

[5] The Senate insinuates that its use of appropriations power to keep the policies in effect was designed to avoid permanent codification of the policies pending further consideration. *Senate Brief* at 23.

[6] Although the court of appeals is responsible for the birth of the Commission's minority preferences through its decision in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the majority in *Winter Park Communications, Inc.* v. *FCC*, 873 F.2d 347 (D.C. Cir. 1989), failed to address the wisdom of the court's earlier decision, instead holding that it was bound by *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), congressional action regarding the policies, and the FCC's expression of continued intent to enforce them. *Winter Park*, 873 F.2d at 355. (Pet. App. 14a-15a).

ployed are minimal or constitutionally permissible,[7] and the *knowledge* that affirmative action programs traditionally have been popular with minority groups and feminists. Unfortunately, the unspoken truth is that the preference classifications do not work to accomplish a specific objective. The fact is that the policies *look* good—but only until one looks *at* the policies.

Metro has presented its views regarding the constitutional standards which should be applied in this case and the level of scrutiny appropriate for both the preferences under review herein and the congressional enactments which perpetuate them. By this reply, Metro seeks to debunk the myth of program diversity and underscore aspects of the Commission's comparative race-, ethnic- and gender-based classifications which are relevant to the constitutional question. Metro believes that a critical analysis of the goals and effects underlying the FCC's discriminatory program will heighten the concerns of each member of this Court and cast aspersions on claims that the Commission's preferential treatment policies have even a rational basis.

ARGUMENT

I. Program Diversity Is An Ill-Defined, Poorly-Crafted And Impermissible Objective For The Imposition Of Race-, Ethnic- and Gender-Based Distinctions.

The sole justification embraced by the Commission as justification for its past and continued employment of minority and female preference classifications in broadcast licensing proceedings (other than judicial or legislative coercion) is the pursuit of "program diversity." *Metro Brief*

[7] Respondent intervenor Rainbow Broadcasting Company (Rainbow) argues that deference should be accorded the FCC's "discretion" in adopting the minority and female preference classifications. *See e.g., Rainbow Brief* at 16-19. This argument is ludicrous, however, given that the enhancement policies (other than the female preference regarding which Rainbow conducts no analysis) were forced upon the Commission by the courts and that its subsequent efforts to reexamine or repeal them were stifled by Congress. *See Metro Brief* at 6-9, 18-19.

at 37; *FCC Brief* at 27.[8] The Commission equates its program diversity objective with "the First Amendment goal of achieving the 'widest possible dissemination of information from diverse and antagonistic sources.' " *FCC Brief* at 30 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)). The Commission concomitantly insists that its preference classifications are not designed to benefit minorities in particular, but to assure "'that viewers and listeners of every race will benefit from access to a broader range of broadcast fare . . . .' " *FCC Brief* at 28 (quoting *Schurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (1989)).

A closer look at the placement and operation of the FCC's race-, ethnic-and gender-based preference classifications in comparative broadcast proceedings, however, reveals that the accomplishment of program diversity cannot be the Commission's true objective. At best, the stated goal is an impermissibly overbroad, muddled phrasing of the rationale originally developed for consideration of minority ownership by the D.C. Circuit. At worst, the program diversity goal represents governmental stereotyping based on arbitrarily-drawn and unconstitutional value judgments regarding optimal program content. Ironically, in the latter analysis the goal destroys itself, entrenching certain voices at the expense of others and annihilating true diversity of perspective.

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[8] *Accord Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce*, 99th Cong. 2nd Sess. 15, 16,22 (1986) (statement of Hon. Mark S. Fowler, Chairman, FCC) (*1986 Hearings*); *Minority Ownership of Broadcast Stations: Hearings on Minority Ownership of Broadcast Stations Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 62, 69, 70 (1989) (statement of Roderick K. Porter, Deputy Chief, FCC Mass Media Bureau) (*1989 Hearings*).

A. The FCC's Consideration Of Race, Ethnicity And Gender Under The "Best Practicable Service" Criterion In Comparative Proceedings Operates Against The Selection Of Program Diversity As The Goal Underlying The Commission's Preference Classification Scheme.

As explained in Metro's Brief, the Commission has enumerated two goals underlying its comparative licensing process: (1) diversification of control of media of mass communications (diversification), and (2) achievement of the best practicable service to the public. *Metro Brief* at 5, 10-14. According to the Commission, in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) (*1965 Policy Statement*), "[d]iversification of control . . . is . . . desirable . . . where a government licensing system limits access by the public to the use of radio and television facilities." *Id.*[9] The "best practicable service" criterion, on the other hand, is based on "a broadcast which meets the *needs* of the public in the area to be served." *Id.*[10]

A review of the *1965 Policy Statement*, along with the lower court decisions which imposed the minority preference upon an unwilling Commission in the 1970's, reveals the glaring flaw in the FCC's diversity rationale and the crucial distinction between the enhancements awarded in comparative proceedings and other congressional and administrative programs designed to increase minority ownership in the broadcast industry: "program diversity" is really "div-

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[9] "As the Supreme Court has stated, the first amendment to the constitution . . . 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,' [citation omitted] . . . . That it is important in a free society to prevent a concentration of control of the sources of news and opinion and particularly, that government should not create such a concentration is equally apparent and well established. [citations omitted]." *Id.* at n. 4.

[10] The Commission elaborated that an important element of such "best practicable service" is "the flexibility to change as local needs and interests change." *Id.*

ersification," yet the minority and female preferences designed to increase "program diversity" are awarded under the "best practicable service," rather than the diversification, criterion. Thus, the FCC's chosen goal is improperly articulated, and cannot rise to compelling importance by virtue of the First Amendment values which permeate diversification considerations.

Numerous examples demonstrate that minority ownership—when required to be considered—was intended by the courts and Congress for evaluation under the diversification criterion, rather than the qualitative integration component of the "best practicable service" criterion. The *TV 9* court noted that "[i]t is consistent with the primary objective of **maximum diversification of ownership of mass communications media** for the Commission . . . to afford favorable consideration to an applicant who . . . gives a local minority group media entrepreneurship." 495 F. 2d at 937 (emphasis added). The same court exclaimed, in *Citizens Communications Center* v. *FCC*, 447 F. 2d 1201, 1213 n. 36 (D.C. Cir. 1971), that "the Commission simply cannot make a valid public interest determination without considering the extent to which the **ownership** of media will be concentrated or **diversified** by the grant of one or another of the applications before it." *Id.* The court followed with a suggestion that in making this determination, the Commission seek to "certify . . . those who would speak out with a fresh voice, [which] would . . . initiate, encourage and expand diversity of approach and viewpoint." *Id.* Even the FCC Minority Ownership Taskforce, in its *Report on Minority Ownership in Broadcasting* (1978), premised its recommendations upon the need for *diversification* and treated program diversity as an aspect of diversification, rather than as quality in a particular applicant which demonstrates better service.[11]

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[11] "Diversity of ideas and viewpoints is vital to a free society. Indeed the promotion of greater *diversification in the media* has been recognized as socially desirable by the FCC as well as by the courts." *Id.* (emphasis added).

Both the Senate's and Rainbow's misapprehension of the Commission's program diversity goal demonstrates the vagueness and overbreadth of the Commission's stated objective. The 1982 lottery legislation,[12] as well as other congressionally-administered programs described in the Senate's Brief, actually were based on the diversification ideal, rather than upon the anticipation that applicants with certain racial, ethnic or gender characteristics inherently provide better service. The preferences for minority ownership incorporated into the lottery statute were designed to "*further diversify the ownership of the media of mass communications.*" *Senate Brief* at 18 (emphasis added). The Summary of Argument presented in the Senate's Brief highlights Congress' concern with the "unequal distribution of control over broadcast outlets," *Senate Brief* at 3. And, Rainbow's Brief is riddled with references such as "the first Amendment values underlying the Commission's diversification policy may properly be considered . . ." *Rainbow Brief* at 18-19. However, diversification considerations are inapplicable to the Commission's preference classifications, which are firmly grounded in the integration of ownership into management aspect of the "best practicable service" criterion.

For over 25 years, the FCC has had a mechanism—the diversification criterion—through which considerations regarding whether grant of a particular application would diversify control of the media of mass communications. The criterion long has been a part of the comparative process and incorporates the First Amendment considerations which the FCC, the Senate and Rainbow view as of paramount importance. Moreover, the criterion is more precisely phrased than the all-consuming goal of assuring program diversity. The "best practicable service" objective, which is the criterion designed to measure a prospective broadcaster's abilities and qualifications to serve the public, and which is intended to be flexible, so as to allow change to meet

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[12] *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982, 47 U.S.C. §§ 309(i)(3)(A) - (4)(A).

local needs, is inappropriate for the rendering of judgments and application of presumptions founded upon a person's race, ethnicity or gender.

B. The FCC's Program Diversity Objective Contravenes The Very Purposes It Supposedly Embodies.

Metro has noted, *inter alia*, both the unnecessary overbreadth of the Commission's program diversity goal and the irrelevancy of the FCC's preference classifications to the First Amendment rationale which supposedly renders program diversity an important or compelling objective. However, the defects inherent in the Commission's comparative preference policies transcend mere misstatement of the policies' goals. The attempt to promote program diversity in the manner advocated by the Commission subverts every conceivable First Amendment tenet.

Metro questions whether explicit governmental action to promote certain kinds and types of programming is permissible under the First Amendment. Whereas, the Commission traditionally has operated upon the assumption that it can rely upon certain structural means to limit concentrations of media control (such as by limiting the number of stations one person may own)[13] the FCC's race-, ethnic- and gender-based classifications appear equivalent to content-based regulations which chill First Amendment rights. To the extent the FCC believes that the types of persons favored by its preference policies are likely to program in a predictible and desirable manner, its choice to promote ownership by such persons to benefit the listening or viewing public is content regulation, as was its requirement under the fairness doctrine that broadcasters attempt to portray diverse positions on particular issues of public importance. *See Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *reconsideration denied*, 3 FCC Rcd 2035 (1988), *aff'd*,

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[13] *See Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce*, 99th Cong., 2nd Sess. 29-30 (1986) (statement of Hon. Mark S. Fowler, Chairman, FCC). *See also FCC Brief* at 31 n. 25.

Syracuse Peace Council v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990). Indeed, the specific content consequences believed to result from the Commission's preference policies are the only justifications proferred for their existence. This is content regulation, prohibited not only by the First Amendment, but also by Section 326 of the Communications Act of 1934, as amended. 47 U.S.C. § 326.

Even assuming such content regulation to be statutorily and constitutionally viable, the Commission's arbitrary and exclusive enumeration of 6 groups as promoting or enhancing program diversity is antithetical to any relevant First Amendment value allegedly furthered thereby. Far from assuring the "widest possible dissemination" of diverse, antagonistic and conflicting viewpoints, the Commission's race-, ethnic- and gender-based preference classifications shut out certain viewpoints in favor of others which have no demonstrated superiority. Are minority groups and females exclusive of those categories of persons who have potential contributions to program diversity? Does the public have greater need for minority and female viewpoints than for the viewpoints of gays or lesbians? Should drug-runners be given access to the airwaves to promote views critical of the current "War on Drugs?" Are there other means of promoting program diversity than awarding preferences based on racial, ethnic and sexual characteristics? The Commission's list of diversity-promoting characteristics demonstrates that its agenda cannot consist of a quest for program diversity *qua* program diversity. Nowhere else in the comparative process are potential contributions to program diversity reviewed on a regular basis. Accordingly, the Commission would appear to be interested only in the proliferation of views by its hand-picked racial and ethnic groups, and females, rather than the promotion of *all* views, which of course it cannot accomplish. True diversity is found in the marketplace of ideas, rather than in the schemes and devices of government. *Metro Brief* at 39. The contribution of the Commission's comparative preference policies to First Amendment values is illusory; the

FCC stifles the First Amendment through involvement in programming predictions. The policies thus fail due to lack of a firm underlying objective—regardless of whether the objective, if valid, would constitute a permissible basis for the imposition of discriminatory classifications.

II. The Commission's Race-, Ethnic- And Gender-Based Preference Classifications, Although Generally Dispositive In Comparative Proceedings, Have No Demonstrated Impact Upon Either Program Diversity Or Minority And Female Ownership.

One of the most egregious and unfortunate aspects of the Commission's comparative race-, ethnic- and gender-based classifications is that, although they generally are dispositive in comparative proceedings, they fail to increase ownership of broadcast stations by minorities and females. It is this outcome that makes the burden placed upon non-minorities and males especially intolerable.

The Commission's program diversity rationale incorporates at least three implicit assumptions. First, is that application of the minority and female preferences actually results in more minority and female victories in comparative proceedings. Second, is the presumption that many if not all of these victors will construct and operate a broadcast station on the frequency awarded, becoming station owners. Finally, it is believed that these owners will transform their minority or female characteristics into programming which is perceived by the general public as representing a "diverse" viewpoint, and that the public is enriched by the resultant diversity more than it would be by programming developed in the free marketplace. A corollary to this assumption is that diversity currently is lacking. The first assumption, appears correct. The last two are insupportable.

A. The FCC's Minority And Female Preferences Are Potentially Dispositive In Every Comparative Broadcast Proceeding.

Metro's Brief documents at length the evolution of the Commission's comparative process and the hypothetical, as well as actual significance of each factor considered there-

under. *Metro Brief* at 4-15. As shown, the modern comparative process basically is a comparison of paper proposals, the guidelines for which have been specifically set forth in years of administrative decisions. Yes, there are engineering requirements, but these are met through the hiring of an engineer who, if astute, can "draft" a superior proposal without ever breaking ground or looking at a broadcast antenna. Similarly, there is a diversification criterion, but as Metro has demonstrated, this factor can be obliterated by an applicant's *promise* to divest its existing media interests in the event its application is granted. And, while there is a quantitative integration requirement, all that is required for 100%, or near 100% credit is that an applicant's principals promise to work 40 hours per week at the proposed station if victorious. Each of the Commission's applicable criteria can be overcome by virtually anyone who "knows the rules." Accordingly, the preliminaries in a comparative proceeding often amount to little more than an exchange of "scouts' honor" promises—then, consideration focuses exclusively upon an applicant's qualitative enhancement factors—which, along with the applicant's pledged quantitative integration, presumptively lead to the "best practicable service." This did not used to be overly detrimental; after all, enhancements such as local residence, civic participation and knowledge regarding the proposed community of license seem relevant to an applicant's ability to serve the public. However, the injection of minority and female preferences into the process, which in practice outweigh the preexisting enhancements, has robbed even these factors of meaning and often (as in the present case) dictates the comparative result.

The Commission does not refute these contentions. The truth is, it cannot. The FCC's Brief merely alleges that the Commission's selection process is multi-factored and lists the same factors already treated in Metro's Brief. The Commission does not deny that the factors are mitigated through other policies and regulations. That the current licensing scenario has little substance is evidenced by Congress' and the Commission's own willingness to replace the entire proc-

ess with a lottery. In fact, it is interesting that the lottery is used to justify the Commission's preference policies, rather than to admit that the existing comparative process, absent minority and female enhancements has little meaning. That the preferences are dispositive in comparative proceedings is evidenced by the present case, which was held in abeyance pending the Commission's own reexamination of the factual, statutory and constitutional underpinnings of the preference policies, and decided by the Commission only upon the direct order of Congress in connection with its action to perpetuate them.[14]

The Commission is critical of Metro's characterization of its comparative licensing process and seeks to allay the significance of Metro's listing of the cases decided by FCC administrative law judges since 1987, along with the ultimate results. However, the FCC's criticisms must be assessed in light its own prior comments regarding the ineffectiveness of its comparative process; its own suggestion that its process be modified or eliminated, and the position it must take herein due to the restrictions imposed upon it by Congress. Regardless of the reasons for grant of the overwhelming number of construction permits to minorities and/or females, at minimum Metro's study demonstrates that the cumulative effect of the Commission's preferential treatment policies and the lack of actual prejudice or discrimination within the license acquisition process, is a monopoly by minorities and females on the acquisition of new permits for operation.

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[14] Rainbow's insinuation that it defeated Metro under the quantitative integration criterion is incorrect, improper and prejudicial. As Metro's Brief and Petition set forth, the minority and female preferences applied in the instant case were dispositive of the outcome. On remand, the Commission specifically noted that "Rainbow has no clear quantitative advantage over Metro . . . " *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987). Metro's qualitative enhancements also would not have been analyzed if the quantitative difference were dispositive. Finally, Metro noted in its Supplemental Brief, a copy of which has been lodged with the Court, the Commission's modification of its method of calculating part-time integration in a manner that would render Metro the *quantitative* victor. However, Metro's Supplemental Brief was rejected by the lower court and that issue is not properly under review herein.

B. The Commission's Minority And Female Preferences Do Not Result In Increased Minority And Female Station Ownership.

The most significant indication of the continued failure of the Commission's race-, ethnic- and gender-based preference classifications is that the only evidence cited in their support (under both the Commission's program diversity rationale and the "remedial" rationale purportedly embraced by the Congress)—underrepresentation[15]—has not changed significantly in the last fifteen years.[16] Since 1978, the percentage of minority-owned stations has increased only from less than 1 percent to slightly over 2 percent.[17] Moreover, the FCC's preference classifications have had a negligible impact on this increase. The primary source of the growth in minority ownership of broadcast stations has been "by far directly tied to tax certificate policy."[18]

The certain failure of the Commission's preferential treatment policies is largely due to the fact that over 70 percent of station owners acquire their properties through transfer, rather than through the comparative process.[19] The major

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[15] Metro has not abandoned its position that underrepresentation of minorities and females in broadcast ownership is insufficient evidence of past discrimination to allow congressional imposition of race-, ethnic- and gender-conscious remedies. *See Metro Brief* at 47. However, even if underrepresentation were a sufficient basis for remedial action, the action chosen, in order to be a considered and rational decision of Congress, would have to be at least reasonably calculated to relieving the underrepresentation. The comparative preference policies have a demonstrated record of failure in this regard.

[16] *See Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations Before the Senate Subcommittee on Communications of the Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 54 (1989) (opening statement of Senator Burns); *Id.* at 2 (opening statement by Senator Inouye).

[17] *Id.* at 2.

[18] *Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations*, 101st Cong., 1st Sess. 29 (1989) (statement of James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters).

[19] *Id.* at 54 (opening statement by Senator Burns).

barrier to minority ownership however, has been and continues to be the financing and capitalization of station acquisition. *Id.* This barrier is exacerbated, rather than overcome by the Commission's rote application of racial, ethnic and female preferences; the "complex, lengthy and costly nature of the FCC's comparative licensing process imposes substantial economic and other burdens (*e.g.*, legal and engineering consultant fees) on minority [and female] applicants who may not have the funds needed to withstand this regulatory maze." *Id.*

Other reasons for the failure of the Commission's preferences to produce increased minority and female ownership of broadcast facilities are set forth in Metro's Brief, and include the Commission's allowance of two-tiered ownership structures, which encourage "token" minority and/or female ownership backed by non-minority and male "passive investors," and the elimination of holding periods on transfers once a construction permit is awarded. *Metro Brief* at 22, 44. Under the Commission's rules, such "token" owners may sell their construction permits immediately upon prevailing in a comparative proceeding. *Metro Brief* at 44.

The consequence of the government's failure to focus upon financial barriers to minority ownership rather than perpetuation of the Commission's preference classifications has been to discourage the development of new ways to increase and promote minority ownership. *Id.* Invalidation of the Commission's current classification policies would place pressure upon the Commission, Congress, and the Executive Branch to implement and devise more effective ways to achieve better formulated ownership promotion goals.

C. The Commission's Minority And Female Preference Policies Do Not Result In Increased Program Diversity.

If the Commission's race-, ethnic- and gender-based preference classifications do not serve to increase minority ownership (which they demonstratedly do not), then, according to the assumptions underlying the program diversity rationale, program diversity is not enhanced. Even were there a connection between the preferences and minority ownership, no nexus between minority ownership and program diversity has been established. *Metro Brief* at 16-18. The Commission's triumphant conclusion that "a nexus between ownership and programming has been established," *FCC Brief* at 41, is outrageous. First, the Commission attempts to blur the distinction, noted hereinabove, between program diversity, an insupportable policy in the context of the comparative "best practicable service" criterion, and diversification of control of media of mass communications. The lottery legislation cited by the Commission, and the Senate report cited in support of the FCC's appropriations bill in 1987, replete with references to "diversity of programming *sources*," *FCC Brief* at 41, refer to diversification of control, not program diversity, as the objective. So does the cited *Kerner Commission Report*. *FCC Brief* at 43. Second, the quoted statement from Jesse L. Jackson, refers to a need by blacks to have "a voice that speaks to them . . . " *Id.* This clearly is not the stated foundation for the program diversity rationale. Moreover, the Commission's citation of the *CRS Report* demonstrates the forced nature of its position in this case—the Report consists of a post-hoc reorganization of materials submitted during the FCC's proceeding to reexamine its preference policies, which proceeding was abruptly terminated and never fully completed due to the congressional appropriations legislation challenged herein. Finally, the Commission has expressed its belief too many times—in fact as recently as September, 1989—that no nexus between minority and/or female ownership and program diversity has ever been demonstrated, for credibility to attach to its arguments in this case.[20]

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[20] *Minority Ownership of Broadcast Stations: Hearing on Minority Ownership of Broadcast Stations*, 101st Cong., 1st Sess. 66-67 (1989) (statement of Roderick K. Porter, Deputy Chief, Mass Media Bureau). In the Commission's words, "it may be equally likely that non-minority broadcast station owners who air programming that is targeted to appeal to the minority audience also may succeed in presenting such diverse viewpoints." *Id.*

III. The Commission's Race-, Ethnic- And Gender-Based Preference Classification Policies Operate To The Detriment Of Minorities, Females, And Non-Minorities Alike.

Both the FCC and Rainbow are quick to argue that the burdens imposed upon non-minorities by the Commission's comparative preference classification policies are minimal. *FCC Brief* at 48; *Rainbow Brief* at 31. Obviously, the reason Metro is before this Court is that the burdens are substantial, amounting to an exclusion of white males from the comparative process and a nullification of the only remaining meaningful comparative criteria, with no countervailing benefits to minorities and females.[21] However, both the FCC and Rainbow overlook that the Commission's policies impose burdens upon *minorities* and *females* as well. As pointed out in Metro's Brief, modern comparative licensing contests often amount to an "unseemly squabble pitting females against minorities," or one minority group against another. *Metro Brief* at 33 n. 90. To the extent that program diversity requires inclusion of the views of groups recognized by the Commission as "underrepresented," this aspect of the preference scheme results in a subversion of the benefits that the particular groups are supposed to achieve. Females, in particular are penalized by the fact that the gender preference is of less weight than the Commission's racial and ethnic preferences.

It is for this reason that the FCC, Rainbow, the Senate and the various *amici* filing on both sides of this case, by ignoring the Commission's *gender-based* enhancement credits, are blinded to one of the central deficiencies in the Commission's preference program. Notwithstanding that the Court granted Metro's petition for certiorari on both the gender and racial/ethnic classification issues, and notwithstanding that the Commission's suggestion on review that the female enhancement may not have been dispositive in

[21] The benefits supposedly all flow to the public at large, which "benefits" from its observance of *bona fide* minority and female views, however defined.

this proceeding was but *dicta*, as Metro has noted,[22] the minority and female enhancement classifications are inextricably intertwined and must be considered together for resolution of the issues presented herein. Metro already has anticipated the possibility that this Court's prevailing separate standards of review for race-based and gender-based classifications might leave one preference intact while resulting in the invalidation of the other. *Metro Brief* at 28-24. However, the fact that the policies share an identical rationale which the Commission has requested be given future sanction as a permissible purpose underlying race-, ethnic- and gender-based preference classifications, *FCC Brief* at 29-30, and the recognition that the preferences conflict and compete against one another within the comparative process, mandates that they be considered together.[23] The failure to do so in this case will wreak havoc on the Commission's comparative licensing proceedings and create yet another case for this Court in the near future.

The Commission's race-, ethnic- and gender-based preference classification policies also work against minorities

[22] *Metro Petition for Certiorari* at 15 n. 22. *See also Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 (1987): "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." (Pet. App. 56a).

[23] *See also Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcommittee on Telecommunications, Consumer Protection, and Finance*, 99th Cong., 2nd Sess. 43 (1986) (statement of Ms. Mimi Dawson, FCC Commissioner) ("The important question is that the female preference was based on the minority preference and the D.C. Circuit's *Steele* opinion spoke of both. There is no way to look at one rationale without the other") *Id.* at 45 (statement of Mark S. Fowler, Chairman, FCC) ("it would be unfair to females as a class if you were to continue to not address the minority question in comparative hearings. It would be unfair to them to have their preference scheme considered . . . but not the minority scheme because that would result in possible unfairness within the hearing process"); *Id.* at 82 ("under the logic of prior Commission decisions, the minority and gender preference policies are linked . . . the Commission's analytical concerns about the constitutional validity of both minority and gender preferences were identical . . . even supporters of the women's preference recognized that it had been inextricably linked to minority preferences").

and females in a different way, one that was highlighted in Metro's initial Brief. The policies encourage *segregation of the airwaves* by according greater weight under the "best practicable service criterion" as minority or female participation in applicants increases. *Metro Brief* at 41. Consider the plight of Metro's integrated minority principal,Elmer N. Lincoln. Mr. Lincoln, a black male, was to serve as Metro's vice-president, and director of sales. *Metro Broadcasting, Inc.*, 96 FCC 2d 1073, 1083 (ALJ 1983) (S.J.A. 35). Mr. Lincoln lived in Longwood, Florida from 1975 to 1983, and subsequently moved to Michigan, where he established a successful automobile dealership. *Id.* However, despite Mr. Lincoln's recognized minority status and his desire and ability to enter the broadcast field, under current Commission policies Mr. Lincoln made a fatal mistake; he chose to work with four white males. Accordingly, Mr. Lincoln, an acknowledged intended beneficiary of the Commission's preferential treatment program, may not take advantage of the FCC's preferences because the Commission arbitrarily has determined that program diversity is better served by an entity that is wholly minority owned. This not only seems unfair, but the logic underlying the conclusion that his participation within Metro will be less valuable to program diversity than an all black or all hispanic applicant entity is specious. Any review of the Commission's classification scheme must take notice of the fact that minorities and females, as well as non-minorities and males are burdened by the Commission's "preference" policies.

IV. The Presence Of Congressional Action Regarding Minority Ownership And The Commission's Enhancement Policies Does Not Immunize The Commission's Race-, Ethnic And Gender-Based Preference Classifications From Constitutional Scrutiny.

The briefs of the FCC, Rainbow and the Senate attach near-dispositive significance to the fact that Congress has acted to promote minority ownership of broadcast facilities in the past and specifically acted to perpetuate the policies at issue herein. However, whereas the Court generally must be cautious in reviewing considered acts of Congress, the

realities and complexities of the Commission's licensing process warrant a much closer look. A review of Congress' other minority ownership policies, including the 1982 lottery statute, shows that the goal favored by Congress is the diffusion or diversification of control over the media of mass communications. Nothing in the legislative record suggests that Congress fully is aware of the mechanics of the Commission's comparative process and the incorporation of the preferences as attributes of participating owners which *per se* suggest *better* programming (under the "best practicable service" criterion), rather than serving as an indicia of diversification of control. In fact, the *authors* of the Senate Brief obviously are unaware of this distinction. Accordingly, Congress' concerns regarding media concentration are not presumptively compatible with the Commission's program diversity goals. This could only become apparent to Congress after considered study of the policies at issue—not the mythical review which accompanies passage of an appropriations measure. To the extent that the Senate acknowledges Congress' "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue," *Senate Brief* at 5, Congress has neglected that mission with regard to the Commission's preference classifications. The appropriations measures challenged herein amount as much to a *shunning* of additional facts and opinions regarding the policies, as a finding that the policies meet with congressional approval.

The purported remedial justification for the Commission's policies is illusory. There is no evidence of discrimination in FCC licensing practices before Congress. Congress' attempted reliance upon underrepresentation to demonstrate such discrimination is a bold attempt at constitutionality; however, in the instant case the underrepresentation statistics stand out more as a 15-year record of failure by the Commission's enhancement policies to affect program diversity.

This Court's decision in *Fullilove* v. *Klutznick* and its clarification of that case in *City of Richmond* v. *J.A. Croson Co.*, suggests that Congress' power to impose race- and

ethnic-based classifications is not without limit. Metro has noted that support for the congressional actions at issue herein cannot be found in the Fourteenth Amendment, which serves only to curtail State discrimination. Nor can support be found in the Fifth Amendment, which purportedly limits governmentally-imposed classifications to the same extent that the Fourteenth Amendment limits the States. Finally, deference to congressional enactments should not force the view that Congress' passage of the lottery legislation, which itself is of uncertain constitutional validity and was adopted for a different purpose, somehow was equivalent to congressional adoption of the FCC's comparative preference scheme. This Court must pierce the veil of political expediency which operates to the detriment of minorities and females by depriving them of programs which address the real barriers they face in the Commission, and in everyday life. Most importantly, the Court should take notice of the fact that even a well-crafted affirmative action plan would find no hospitable dwelling-place within the FCC's currently vaccuous comparative process.

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed, the Commission's minority and female preference policies declared unconstitutional, and the construction permit for Channel 65 at Orlando, Florida awarded to Metro.

Respectfully submitted,

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding a qualitative enhancement for minority ownership in comparative license proceedings violates the equal protection component of the Fifth Amendment.

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INTEREST OF THE UNITED STATES

The United States is responsible for enforcing many statutes prohibiting discrimination on the basis of race or national origin (see, *e.g.*, 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, *e.g.*, 42 U.S.C. 2000h-2). In this case, the United States filed a brief as amicus curiae in the court of appeals, and twice filed extensive comments with the Commission as part of the inquiry proceeding to consider the validity of its minority preference policies.[1] In each of these submissions, the United States maintained that the Commission's policies could not withstand the exacting scrutiny required by the Constitution and this Court's decisions, and were thus invalid. The United States adheres to that position.[2]

[1] See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986), modified, 2 F.C.C. Rcd 2377 (1987).

[2] Given the position of the United States on the question presented, and in order for the Court to have the benefit of the views of the administrative agency involved, the Acting Solicitor General has authorized the Federal Communications Commission to appear before this Court through its own attorneys. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a).

STATEMENT

1. In the Communications Act of 1934, Congress assigned the Federal Communications Commission (FCC) exclusive authority to grant licenses to build and operate radio and television stations in the United States. See 47 U.S.C. 151, 301, 303, 307. When two or more persons file mutually exclusive applications for the same broadcasting authority, the FCC conducts what is known as a comparative hearing to determine which applicant will best serve the "public convenience, interest, or necessity." 47 U.S.C. 303. See generally *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [*1965 Policy Statement*]. In such a proceeding, the FCC weighs both "quantitative" and "qualitative" attributes of competing applicants. The quantitative assessment generally rests on each applicant's proportional integration of ownership into management and each applicant's other media holdings. If one applicant has a clear quantitative advantage, then that applicant will receive the license if he is otherwise qualified. Pet. App. 4a. If there are no significant quantitative differences among the applicants, the FCC then assesses each applicant's relative strengths on a variety of "qualitative" factors. These factors include local residence, participation in civic activities, past broadcast experience, and—of particular relevance here—the race (and gender) of the owner. See Pet. App. 4a; *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978).

As originally conceived and implemented, the FCC's selection criteria for comparative license proceedings were race-neutral. However, in response to decisions of the District of Columbia Circuit, see, *e.g.*, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974); *Garrett* v. *FCC*, 513 F.2d 1056 (1975), the FCC adopted a policy of awarding preferences in comparative proceedings for minority ownership. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980-981 (1978) [*1978 Policy Statement*]; *WPIX, Inc.*, 68 F.C.C.2d at 411-412; Minority Ownership Taskforce, FCC, *Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [*Task Force Report*]. The Commission explained that the policy

was required because "[f]ull minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming • • • [, and] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the [broadcast] spectrum." *1978 Policy Statement*, 68 F.C.C.2d at 981.[3]

For purposes of the preference policy, the Commission defined "minorities" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *1978 Policy Statement*, 68 F.C.C.2d at 980 n.8. Minority ownership and participation in management is a "plus-factor [to be] weighed along with all other relevant factors in determining which applicant is to be awarded a preference." *TV 9, Inc.*, 495 F.2d at 941 n.2. The FCC awards a credit for minority ownership to the extent that an individual minority owner will actively participate in the management of the station. See *id.* at 941; *WPIX, Inc.*, 68 F.C.C.2d at 411-412.

2. In 1982, the FCC assigned a new UHF television channel to Orlando, Florida. See *Amendment of § 73.606(b), Table of Assignments, Television Broadcast Stations (New Smyrna Beach, Orlando, and Winter Park, Florida)*, 50 Rad. Reg. 2d (P & F) 1714 (1982). The following year, competing applications to build and operate that television station were filed with the FCC by three entities: petitioner Metro Broadcasting, Inc., a corporation owned by nine men, four of whom are local residents and

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[3] This programming diversity rationale undergirds other FCC policies designed to promote greater minority participation in broadcasting. Since 1978, the FCC has sought to increase such minority participation by awarding tax incentives to station owners who sell facilities to minority-controlled applicants. See 26 U.S.C. 1071; *1978 Policy Statement*, 68 F.C.C.2d at 982-983. By statute, Congress has also directed the FCC to use minority preferences in the assignment by lottery of certain low-power stations. See 47 U.S.C. 309(i)(3)(A).

Moreover, in 1978, the FCC adopted its "distress sale" program, under which licensees, under certain circumstances, may sell stations at below market prices rather than risk revocation or nonrenewal of the license—but only to minority-controlled buyers. *1978 Policy Statement*, 68 F.C.C.2d at 983. The validity of that program is before the Court in *Astroline Communications Co.* v. *Shurberg Broadcasting of Hartford, Inc.*, cert. granted, No. 89-700 (Jan. 8, 1990).

one of whom is black; Rainbow Broadcasting Company, a general partnership consisting of two women and one man, all of whom are Hispanic; and Winter Park Communications, Inc., a corporation with no minority ownership. Pet. App. 2a-4a, 81a-88a; *Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073, 1079-1086 (1983). After disqualifying Rainbow for misrepresentations in its proposal, the administrative law judge granted the license to petitioner, concluding that it was "an overwhelming comparative winner over Winter Park." *Id.* at 1087-1088.

The FCC's Review Board reversed that decision and awarded the permit to Rainbow. Pet. App. 64a-93a; see *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (1984). The Board concluded, contrary to the ALJ's findings, that Rainbow was a qualified applicant, and thus proceeded to compare all three applicants. The Board determined that Rainbow was not only quantitatively ahead of petitioner, but also qualitatively superior because Rainbow was entitled to "a substantial preference for minority participation [in management] by 90% of its stock ownership * * * in contrast with [petitioner's] 19.8% credit [for minority participation]." Pet. App. 87a. The Board also gave Rainbow "a solid broadcast preference" because one of its principals' past broadcast experience was "much more significant" than that of petitioner's owners. *Ibid.*

In October 1985, the FCC denied both petitioner's and Winter Park's applications to review the Board's decision. Pet. App. 60a-63a. As a result, the Board's ruling became the FCC's final administrative decision under 47 U.S.C. 155(c)(3). Petitioner and Winter Park filed timely appeals from the Commission's decision to the District of Columbia Circuit.[4]

[4] The disposition of those appeals was delayed for several years because of events arising out of related proceedings. In August 1985, a panel of the court of appeals held that the FCC had exceeded its statutory authority by adopting a female preference in comparative license proceedings. *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The en banc court of appeals, however, granted a petition for rehearing, vacated the panel opinion, and ordered supplemental briefing. The court of appeals later granted the FCC's motion for remand, and the Commission initiated a non-adjudicatory inquiry proceeding to consider the validity of its female and minority preference policies. See note 1, *supra*.

As a result of the remand in the *Steele* case, the court of appeals also remanded the record in the instant case to the FCC. Pet. App. 58a-59a. On remand, the FCC concluded that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to [petitioner]." Pet. App. 57a; see *Metro Broadcasting, Inc.*, 2 F.C.C. Rcd 1474, 1475 (1987). The FCC therefore held this case in abeyance pending the outcome of its inquiry proceeding reexamining its minority preference policies.

In response to the FCC's initiation of its inquiry proceeding, however, Congress in 1987 enacted an appropriations rider that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its minority and female preference policies. Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987). Congress has since extended the prohibition through fiscal years 1989 and 1990. See Pub. L. No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).

In response to the appropriations rider, the FCC closed its inquiry proceeding and reinstated its policy of awarding gender and racial preferences in comparative license proceedings. See, *e.g.*, *Faith Center, Inc.*, 3 F.C.C. Rcd 868 (1988). The FCC then reaffirmed its earlier decision in this case awarding the permit to Rainbow and denying petitioner's competing application. Pet. App. 48a-51a; see *Metro Broadcasting, Inc.*, 3 F.C.C. Rcd 866 (1988).

[5] The court of appeals declined to address the validity of the FCC's gender preference policy, because the FCC had "determined * * * that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation." Pet. App. 10a n.5 (citing 3 F.C.C. Rcd at 867 n.1 (Pet. App. 49a n.1)). For that reason, the validity of that policy is not before this Court.

3. In April 1989, a divided court of appeals affirmed. Pet. App. 1a-46a. The court first determined that the constitutionality of the FCC's minority ownership policy was properly at issue because "the Commission found on remand that Rainbow's enhancement for minority ownership was probably dispositive." *Id.* at 10a; see note 4, *supra*.[5] The majority then concluded that the decision in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985), squarely controlled, and thus that the FCC's policy "easily passes constitutional muster." Pet. App. 10a (quoting *West Michigan*, 735 F.2d at 613).

The majority noted that the *West Michigan* court had upheld the FCC's comparative hearing minority preference policy for two principal reasons. First, the policy was not a rigid quota system, but rather "a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is de-

signed to obtain a diverse mix of broadcasters," 735 F.2d at 613 (emphasis in original). Second, in amending 47 U.S.C. 309(i) in 1982 to authorize the FCC to award minority preferences in lotteries, Congress had recognized that the underrepresentation of minorities in broadcasting stemmed from racial discrimination, and therefore "must be understood to have viewed the sort of enhancement used here as a valid remedial measure," 735 F.2d at 613-614. Finally, the majority concluded that *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not undermine the validity of *West Michigan* or call into question the FCC's minority preference policy. Pet. App. 12a-13a.

Judge Williams dissented from the court's constitutional holding. Pet. App. 18a-46a. He concluded that this Court's recent decisions in *Croson* and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), "largely undermined" the validity of *West Michigan* and thus the constitutionality of the FCC's minority preference policy as well. Pet. App. 18a. In his view, the FCC's asserted rationale for its policy—promoting diversity in programming—cannot survive *Croson*. See *id.* at 18a, 19a-30a. Judge Williams further concluded that the alternative justification of remedying prior discrimination could not be relied upon, because it was asserted only by Rainbow—not the FCC—and in any event might not meet the constitutional standards articulated in *Wygant* and *Croson*. See *id.* at 30a-45a.[6]

SUMMARY OF ARGUMENT

I. The FCC's policy classifies on the basis of race and is therefore constitutionally suspect. In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government's use of a racial classification is subject to "strict scrutiny," that is, the racial classification must be "narrowly tailored" to achieve a "compelling governmental interest." In our view, a racial classification

[6] The court of appeals later denied petitions for rehearing, together with suggestions of rehearing en banc, filed by both Winter Park and petitioner. Pet. App. 96a-97a, 98a-99a. Judges Silberman, Williams, D.H. Ginsburg, and Sentelle dissented from the denial of rehearing en banc. *Id.* at 98a-99a.

adopted by the federal government, no less than a state or local government, should be subject to the same exacting standard of review. In deciding whether a federal preference program is designed to achieve a compelling governmental interest, a determination made by Congress that there is a need for remedial race-conscious action should be entitled to significant deference. This additional measure of deference is appropriate, however, only if Congress itself makes the critical determination that such a program is required, and only if this determination has a demonstrable basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. A. This Court has endorsed only one sufficiently compelling justification for a racial classification: remedying the effects of identified present or past racial discrimination. That justification, however, may not be invoked to uphold the preference policy at issue. First, Congress has not specifically mandated that the Commission maintain a policy of granting preferences to minority applicants in comparative license proceedings in order to remedy prior discrimination. Second, even if Congress could somehow be viewed as having advanced a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry—let alone in the awarding of broadcast licenses—to justify race-conscious relief. Finally, the FCC, the agency that adopted the "policy" Congress has frozen, has consistently taken the position that that policy is *not* designed to remedy prior discrimination in the broadcasting industry.

Even if it could be said that the FCC's preference policy was designed to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. Neither Congress nor the Commission has considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. Moreover, the minority preference policy is not aimed at correcting the actual effects of past discrimination, but instead reflexively confers an added benefit on all who possess the requisite skin color or ethnic background.

B. The second asserted justification for the minority preference policy is to further diversity of programming. But

the Court has never held that such a quest for programming diversity is a sufficiently compelling justification for the government's use of a racial classification, and there is reason to question whether that justification—as applied to the public broadcasting spectrum—would so qualify. The notion that race or ethnicity is a valid proxy for programming choices is precisely the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if programming diversity could count as a compelling governmental interest, it cannot be said that either Congress or the FCC has established the factual predicate necessary to support the use of racial classifications to promote programming diversity. The legislative history shows at most that Congress relied on untested assumptions—about the existence of distinct "minority" viewpoints, about whether those viewpoints are underserved by today's broadcasting industry, and about whether increasing minority ownership would translate into more "minority" programming. Nor does the administrative history of the FCC's policy offer anything to fill "this evidentiary void." Pet. App. 23a (Williams, J., dissenting).

Putting aside the evidentiary difficulties with the "programming diversity" rationale, the FCC's policy is not "narrowly tailored" to accomplish that asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained.

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION'S POLICY OF AWARDING A QUALITATIVE ENHANCEMENT FOR MINORITY OWNERSHIP IN COMPARATIVE LICENSE PROCEEDINGS VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

1. Classifications By The Federal Government On The Basis Of Race May Be Sustained Only If "Narrowly Tailored" To Achieve A "Compelling" Interest

A. The federal policy at issue in this case gives a preference to Black, Hispanic, Oriental, Indian, Eskimo, and Aleutian applicants for broadcast licenses. It plainly classifies on the basis

of race and is thus in tension with the fundamental principle embodied in the guarantee of equal protection that skin color and ethnic origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown* v. *Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880). Accordingly, under this Court's equal protection cases, the FCC's preference policy is constitutionally suspect. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 432, 433 (1984).

The Court has determined, however, that government action based on race, although suspect, is not always unconstitutional. A court of equity may, for example, take race into account in remedying past acts of intentional, unlawful discrimination on the basis of race. See, *e.g.*, *United States* v. *Paradise*, 480 U.S. 149 (1987); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Similarly, a competent governmental authority may in certain circumstances take race into account when necessary to remedy prior discrimination. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); see also *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

Nevertheless, the Court has made plain that " '[d]istinctions between citizens solely because of their ancestry' * * * [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). On that account, the Court has ruled that, to withstand constitutional scrutiny, a law classifying on the basis of race or ethnicity ordinarily "must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' " of that purpose. *Palmore* v. *Sidoti*, 466 U.S. at 432-433.

B. Last Term, a majority of the Court for the first time "reach[ed] consensus on the appropriate constitutional analysis" (*Paradise*, 480 U.S. at 166) to be applied where a *state or local government* adopts a racial or ethnic preference in order to remedy past discrimination. In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that this use of race or ethnicity is subject to "strict scrutiny," that is, the racial or ethnic classification must be "narrowly

tailored" to achieve a "compelling governmental interest." *Id.* at 720-721 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 735 (Scalia, J., concurring in the judgment).

As Justice O'Connor explained in *Croson*:

> Absent searching judicial inquiry into the justification for * * * race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

109 S. Ct. at 721; see also *Wygant*, 476 U.S. at 273 (plurality opinion).

1. The first part of that constitutional analysis focuses on the asserted "compelling governmental interest" supporting the questioned classification, and involves two related inquiries: identifying the interest and determining whether it has a sufficient basis in fact. A majority of the Court has thus far endorsed only one justification for a racial preference that may in appropriate circumstances be sufficiently compelling: the government's interest "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). See *Croson*, 109 S. Ct. at 721-723 (plurality opinion); *id.* at 743-745 (Marshall, J., dissenting); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624-625 (1984); see also *Wygant*, 476 U.S. at 274 (plurality opinion).[7]

[7] In addition, individual Members of the Court have suggested or found that the promotion of "racial diversity" may be a sufficiently compelling justification for the government to impose race-based measures, at least in the context of promoting a diverse student body or a diverse faculty in higher education. See *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

The Court has also established that the asserted compelling justification for a racial classification must be based on "sufficient evidence." *Wygant*, 476 U.S. at 277 (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment); see *Croson*, 109 S. Ct. at 727 (opinion of the Court). In *Croson*, the Court emphasized that there must be a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Id.* at 724 (opinion of the Court) (internal quotation marks and citation omitted). In other words, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Ibid.* (quoting *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting)).

2. The second part of the constitutional analysis focuses on whether a racial classification is "narrowly tailored" to promote the compelling governmental interest. In this regard, two factors were specified by a majority of the Court in *Croson* and are particularly significant: (1) whether alternative race-neutral remedies were considered and attempted before resorting to race-conscious measures, see, *e.g.*, *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 283 (plurality opinion); *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring), and (2) whether the racial preference is limited to those who have in fact suffered the disadvantage or discrimination. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring); *Paradise*, 480 U.S. at 171 (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). The Court has identified other factors relevant to the "narrow tailoring" inquiry as well, such as the flexibility and planned duration of the remedy, and the effect of the classification on innocent third parties. *Wygant*, 476 U.S. at 282-283 (plurality opinion); *id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 514-515 (Powell, J., concurring). A thorough consideration of these factors is essential in order to ensure "that the means chosen 'fit' [the asserted]

compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721 (plurality opinion).

C. In *City of Richmond* v. *J.A. Croson Co.*, *supra*, the Court had no occasion to determine the standard of review applicable to cases challenging racial preference programs adopted by the *federal government*—a threshold issue in this case. And although in *Fullilove* v. *Klutznick*, *supra*, the Court upheld a federal minority business enterprise preference program against a facial constitutional challenge, three separate opinions supported that judgment—none of which commanded more than three votes—and thus the Court did not resolve the preliminary question of the appropriate standard of review. Compare 448 U.S. at 453-495 (opinion of Burger, C.J., joined by White and Powell, JJ.); with *id.* at 495-517 (Powell, J., concurring); and *id.* at 517-522 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment).

In our view, racial classifications adopted by the federal government must also withstand the "strict scrutiny" applied to those adopted by state and local governments. Thus, federal minority preference programs, no less than state and local programs, must serve a compelling government interest and be narrowly tailored to achieve that interest. In applying this standard, however, we believe that courts should give greater deference to a determination by Congress that there is a compelling need for remedial action than would be accorded a similar determination by a state or local governmental body.

1. Although the Equal Protection Clause by its terms applies only to the States and not to the federal government, it is settled by the decisions of this Court that equal protection analysis under the Fifth Amendment is generally the same as that under the Fourteenth Amendment. *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 364-365 n.4 (1974). To be sure, the two protections are not coextensive for all purposes. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). But this Court has never suggested that the two Clauses supply different degrees of protection to individuals who have been disadvantaged

by official government action based on their race. See *Bolling* v. *Sharpe*, 347 U.S. at 499-500. To the contrary, the understanding that all racial classifications are suspect and must be subjected "to the most rigid scrutiny" was first articulated in a case involving the federal government, *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944), and the Court has specifically reaffirmed in the context of minority preferences that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *Paradise*, 480 U.S. at 166 n.16 (plurality opinion); *id.* at 196 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Indeed, from the point of view of an individual who has been penalized because of his race, it matters little whether the racial classification is sponsored by the federal government or by some other governmental entity. Accordingly, for the same reasons that *Croson* concluded that preferential racial classifications must be subject to strict scrutiny under the Fourteenth Amendment, we believe that such classifications must be subject to the same exacting standard of review under the Fifth Amendment.

At the same time, this Court's decisions in *Fullilove* and *Croson* suggest that there are important differences between the Congress and other governmental bodies in terms of their power to rectify prior discrimination. Congress, unlike state and local legislative bodies, is a national representative body. It may legislate only with the approval of both Houses—selected by constitutional design on different representational bases— and the concurrence of the President, who is "elected by all the people." *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Thus, it may fairly be said that Congress is more likely than other, more parochial bodies to exercise its powers in ways that take into account the interests of all citizens. See generally The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961).

In addition, Section 5 of the Fourteenth Amendment specifically empowers Congress "to enforce, by appropriate legislation," the guarantee of equal protection set forth in Section 1 of that Amendment. When Congress exercises its "unique remedial powers" under the Fourteenth Amendment, *Croson*, 109 S. Ct. at 718 (opinion of O'Connor, J.), its identification of a compelling

need to assist the States in overcoming discrimination in a particular industry or segment of the economy should be accorded greater deference than a similar finding by a state or local legislative body. See *Croson*, 109 S. Ct. at 718-719 (opinion of O'Connor, J.); *Fullilove*, 448 U.S. at 472-480 (opinion of Burger, C.J.); *id.* at 499-506 (Powell, J., concurring). As Justice O'Connor concluded in *Croson*, 109 S. Ct. at 719, the Section 5 power "may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." See also *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966).

2. Although Congress has special powers to enforce the guarantee of equal protection, it is also of course subject to that guarantee. Thus, neither the structural guarantees of the Constitution, nor the express grant of "unique remedial powers" under Section 5 of the Fourteenth Amendment, can eliminate the need for careful judicial scrutiny of any program adopted by the federal government that classifies individuals by race. Accordingly, there remain important limitations on Congress's power to adopt racial preferences that have direct relevance in this case.

First, the reasons identified by the Court for giving greater deference to a congressional determination of a compelling need for a racial classification apply uniquely to *Congress*, not to other components of the federal government. Thus, neither *Fullilove* nor *Croson* stand for the proposition that a federal administrative agency, acting under a general grant of authority to regulate a particular industry in the public interest, should be entitled to any special deference if it makes a finding of prior discrimination within that industry, or identifies other potentially compelling governmental interests that might support the use of racial classifications. Cf. *NAACP* v. *FPC*, 425 U.S. 662 (1976). Congress may of course rely "on the administrative agency to flesh out [the] skeleton, pursuant to delegated rulemaking authority" (*Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.)); but, given the suspect nature of any program based on racial classifications, Congress itself must make the "critical determinations." *Ibid.* Cf. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976). And since

Congress acts only by enacting legislation, this should ordinarily mean that Congress must make its intention to require the use of a remedial racial classification "unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 109 S. Ct. 2397, 2400 (1989) (citation omitted).

Second, the Court's decisions also indicate that a determination by Congress that there is a compelling need for racial preferences may not be made in a vacuum. Chief Justice Burger concluded that the minority preference program at issue in *Fullilove* was within Congress's power only upon finding, after an extended review of the legislative background, that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-478. Justice Powell similarly concluded that Congress must have "made findings adequate to support its determination that minority contractors have suffered extensive discrimination." *Id.* at 502. Ordinarily, of course, a reviewing court will not demand that Congress have a factual basis in support of whatever legislation it enacts. See *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). But as the Court has stated in an analogous context, "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U.S. at 103.

Third, while significant deference should be given to a congressional determination that there is a compelling need for a remedial racial preference, a similar degree of deference is not appropriate in deciding whether the particular remedy chosen by Congress is "narrowly tailored" to achieve that compelling interest. As Justice Powell has observed, Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove*, 448 U.S. at 502-503 (concurring opinion). Congress may thus be said to have special competence

to determine whether particular sectors of the national economy have been historically afflicted by discrimination, and to assess the continuing relevance of this discrimination in the present day. But Congress does not enjoy a similar advantage in ensuring that remedies adopted for rectifying past wrongs are formulated in such a way as to minimize the intrusion upon individual rights. Cf. *Katzenbach* v. *Morgan*, 384 U.S. at 668-670 (Harlan, J., dissenting).

As Chief Justice Burger observed in *Fullilove*, it is important that there be a "careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." 448 U.S. at 480. Accordingly, in reviewing the minority set-aside in that case, he took into account Congress's consideration of alternative race-neutral means and the actual flexibility and duration of the measure adopted, stressing the program's limitation to correcting the actual effects of discrimination. *Id.* at 463-476, 480-482, 487-488.[8] Likewise, Justice Powell carefully reviewed the congressional program in light of factors similar to those identified by the Chief Justice. *Id.* at 510-515. The understanding that any racial classification adopted by Congress must be "narrowly tailored" to achieve a valid remedial purpose is reinforced by opinions of individual Members of the Court in *Croson*. Justice O'Connor, joined by the Chief Justice and Justice White, expressly recognized that the "fine tuning" of the minority set-aside in *Fullilove*, see note 8, *supra*, was a constitutional prerequisite. See 109 S. Ct. at 718. And Justices Stevens,

[8] Chief Justice Burger emphasized, for example, that the minority set-aside provision "cannot pass muster unless * * * it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively." *Fullilove*, 448 U.S. at 487. He then explained that the program's racial presumption "may be rebutted," *ibid.*, that there was available a "complaint procedure * * * for reporting 'unjust participation by an enterprise * * * in the * * * program,' " *id.* at 488, and that no minority business enterprise may "exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination," *ibid.*

Kennedy, and Scalia also acknowledged in separate opinions that such tailoring of a racial classification to the asserted remedial purpose was constitutionally essential. See *id.* at 730 n.1 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 734 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 735-739 (Scalia, J., concurring in the judgment).[9]

3. In sum, a racial classification adopted by the federal government, no less than a state or local government, should be subject to an exacting standard of review. Like any racial classification, a federal preference program must be designed to achieve a compelling governmental interest. In deciding whether such an interest exists, a determination made by Congress that there is a need for remedial race-conscious action is entitled to significant deference. But this additional measure of deference is appropriate only if Congress itself makes the critical determination that such a program is required, and only if this determination has an adequate basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. The Federal Communications Commission's Policy Of Awarding A Qualitative Enhancement For Minority Ownership In Comparative License Proceedings Is Not "Narrowly Tailored" To Achieve A "Compelling" Interest

The question for decision in this case, therefore, has two components: first, whether any "compelling" governmental interest

[9] Analogous support for this conclusion is also supplied by the Court's decisions assessing the constitutionality of gender classifications in federal statutes. The Court has always required the same degree of "fit" between a gender classification and the governmental interest asserted in support of that classification, whether the statute was enacted by Congress or by one of the States. *Rostker* v. *Goldberg*, 453 U.S. 57, 69-70 (1981). Moreover, the Court has applied the same exacting standard of review to federal gender classifications even when the discrimination is directed against men rather than women, and even when a remedial objective has been asserted in support of the differential treatment. See *Califano* v. *Goldfarb*, 430 U.S. 199, 210-212 (1977) (plurality opinion); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 642-645 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (plurality opinion). These authorities suggest that the mere invocation of a "remedial" justification for a racial classification should not result in any relaxation of the requirement that such classifications be "narrowly tailored."

may be found to justify the FCC's policy of awarding preferences in comparative license proceedings on the basis of race or ethnic origin; and second, whether that policy is "narrowly tailored" to achieve an identified compelling governmental purpose. The Commission's policy fails both tests.

A. 1. So far, this Court has endorsed only one sufficiently compelling justification for a racial classification, namely, remedying the effects of identified present or past racial discrimination. See p. 10, *supra*. Although the majority below relied upon this justification in upholding the Commission's policy (Pet. App. 10a-11a), we do not believe that asserted interest may be invoked here for several reasons.

a. Congress has not specifically mandated that the Commission maintain a policy of granting preferences to minority applicants in comparative license proceedings in order to remedy prior discrimination. Thus, it cannot be said that Congress has, through appropriate statutory language, made an authoritative determination that there is a compelling need to rectify the effects of discrimination in the broadcasting industry. See pp. 14-15, *supra*.[10]

[10] We note that even if Congress had legislated with the requisite specificity, it would be questionable whether such legislation could be characterized as an exercise of Congress's powers under Section 5 of the Fourteenth Amendment. If Congress found that the *FCC* had maintained discriminatory policies in awarding broadcast licenses, the resulting inequalities would be a product of unlawful federal action remediable under the Fifth Amendment, rather than unlawful state action subject to Sections 1 and 5 of the Fourteenth Amendment. Moreover, given that the broadcasting industry has been pervasively regulated by the FCC since 1934 (and by the Federal Radio Commission before that under the Radio Act of 1927, see Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162), it is difficult to imagine what unlawful action taken by the *States* might give rise to inequalities in the broadcasting industry, except for the most general "societal discrimination." See pp. 21-22, *infra*. Section 5 of the Fourteenth Amendment, however, gives Congress power to legislate only with respect to Section 1 of that Amendment, governing state as opposed to federal action.

This case therefore differs from *Fullilove*, where Congress could be said to be acting under Section 5 to rectify past discrimination in the awarding of public works contracts *by the States*. In any event, the Court need not reach the broader question whether Congress would have the power to adopt remedial race-conscious legislation for the broadcasting industry under Section 5 of the Fourteenth Amendment (or for that matter, under Section 2 of the Thirteenth Amendment, see *Jones* v. *Alfred H. Mayer & Co.*, 392 U.S. 409 (1968)), since in our view it is clear that Congress has not attempted to do so with the requisite specificity or with the kind of supporting evidence required by *Fullilove*.

The only congressional action directly relevant to this program is the enactment of three successive appropriations riders, each of which provides that the FCC is not to spend appropriated funds during a given fiscal year "to repeal, to retroactively apply changes in, or to continue a reexamination of [the Commission's minority preference policy]." 101 Stat. 1329-31 to 1029-32; 102 Stat. 2216-2217; 103 Stat. 1020-1021. The appropriations riders, by their terms, do not purport to mandate the use of a particular racial classification; nor do they charge the Commission with any remedial duties or make any findings of prior discrimination affecting the broadcasting industry. At most, they direct that the status quo be maintained with respect to *the Commission*'s policies – policies that have always been grounded in the "programming diversity" rationale, rather than in any finding of prior discrimination (see p. 22, *infra*). That call for "a kind of mental standstill," as Judge Williams observed, Pet. App. 35a, scarcely resembles a legislative directive requiring the use of a racial classification in comparative license proceedings. See *Hampton* v. *Mow Sun Wong*, 426 U.S. at 114-116; see also *TVA* v. *Hill*, 437 U.S. 153, 190-191 (1978).[11]

The sparse legislative history of the appropriations riders confirms that Congress's delphic action cannot be regarded as an effort to remedy identified past or present discrimination. For example, the Senate Appropriations Committee, which was re-

[11] In 1982, Congress amended the Communications Act to authorize the FCC to award licenses under a random selection system, and specifically directed the Commission, in creating any such lottery procedure, to grant "an additional significant preference * * * to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). By its terms, however, that provision does not purport to require the Commission to grant a similar preference in comparative proceedings, and the pertinent legislative history contains no suggestion that Congress so intended. See, *e.g.*, H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-44 (1982); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981).

sponsible for the language in the 1987 rider, stated that the Commission's reexamination of its preference policy was "unwarranted," in part because

> [t]he Congress has expressed its support for [that policy] in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority • • • audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); see also S. Rep. No. 388, 100th Cong., 2d Sess. 79 (1988). Indeed, the only Committee Report that mentions even in passing a possible *remedial* justification for the Commission's policies is that associated with a *different* minority preference policy—the preference applicable to a lottery system. See 47 U.S.C. 309(i)(3)(A) and notes 3 and 11, *supra*. In these circumstances, the legislative record does not suggest, let alone confirm, that Congress made any "considered decision" (*Fullilove*, 448 U.S. at 473) that minority preferences are necessary in comparative hearings to remedy the effects of racial discrimination in the broadcasting industry.

b. Even if Congress could somehow be viewed as having adopted a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry to justify race-conscious relief. See, *e.g.*, *Croson*, 109 S. Ct. at 727 (opinion of the Court); *Wygant*, 476 U.S. at 277 (plurality opinion); *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting). To the contrary, the sparse legislative record associated with the appropriations riders plainly shows that Congress had no basis—certainly no articulated basis—for finding that either the Commission or the broadcasting industry in general has engaged in racially discriminatory practices that hampered minorities' ability to own broadcasting licenses. See, *e.g.*, Pet. App. 38a-39a. Nor does the bare mention of a possible remedial justification in the legislative history of the lottery program constitute the kind of factual predicate necessary to sustain the use of a racial classification. Compare *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.) (relying on extensive legislative history of related legislation).

Indeed, as far as we are aware, the only argument that could be advanced in support of the Commission's preference policies as a remedial measure would be that, because of prior societal discrimination, minority groups have fewer financial resources than nonminorities, and thus have not been able to purchase the radio and television stations that regularly become available on the resale market.[12] But this Court has made clear in the context of state and local preference policies that "societal discrimination," standing alone, cannot justify a racial classification. See *Croson*, 109 S. Ct. at 723 (plurality opinion). As Justice Powell observed in *Wygant*:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. • • • No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive.

476 U.S. at 276 (plurality opinion); accord *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

While Congress can no doubt legislate more broadly than state and local bodies, this Court has never held that generalized societal discrimination, by itself, is sufficient to sustain a federal minority preference program. In sustaining a federal minority set-aside program for federally funded state public works projects in *Fullilove*, the Court was careful to note that Congress had before it evidence that prior discrimination had infected the construction industry, and therefore justified the exercise

[12] Large numbers of radio and television stations are transferred each year in private transactions that appear to be routinely approved by the FCC. Indeed, based on the FCC's estimate that approximately one-half of all transfer applications appr ed each year reflect station sales (as opposed to reorganizations), it would appear that approximately 9% of all broadcast stations (representing roughly 1000 radio stations and 250 television stations) are sold in any given year (based on averages over the past 10 years). See Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988). Accordingly, it is reasonable to assume that the principal impediment to increased minority ownership of broadcasting outlets in today's market is the fact that members of minority groups have fewer of the financial resources needed to acquire and operate radio and television stations.

of Congress's remedial powers. See 448 U.S. at 456-467 (opinion of Burger, C.J.); *id.* at 502-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment). Here, there can be no claim that Congress had before it evidence suggesting that minorities have been denied any opportunity to acquire broadcasting facilities because of official or private acts of discrimination. This is rather a case like *Croson*, in which "[t]here is nothing approaching a prima facie case of constitutional or statutory violation by *anyone*" in the broadcasting industry. 109 S. Ct. at 724 (opinion of the Court).

c. Finally, the FCC, the agency that promulgated the "policy" Congress has frozen, has consistently taken the position that that policy is *not* designed to remedy prior discrimination in the broadcasting industry. In this case, for example, the Commission has made plain that its "goal in implementing the preference policy • • • has not been to remedy prior discrimination against minorities or to provide remedial benefits." FCC C.A. Br. 30; see Pet. App. 11a n.6, 33a. That position stems from the fact that "[t]here has never been a finding, nor • • • even an allegation, that the FCC engaged in prior discrimination against racial minorities • • • in its licensing process." *Id.* at 33a. Accordingly, under settled principles of administrative law, the racial classification at issue here may not be sustained on the basis of any agency finding of the need for remedial action. See, *e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

2. Even if it could be said that the FCC's preference policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. First, neither Congress nor the Commission has considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. See, *e.g.*, *Croson*, 109 S. Ct. at 728; *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). Before 1978, the Commission had adopted various race-neutral policies designed to increase diversity of *programming*, see *1978 Policy Statement*, 68 F.C.C. 2d at 980, 981; but it has never undertaken any race-neutral steps to augment diversity of *ownership*, either prior to adopting its preference policies or since then. Moreover, the minority preference policy is not aimed at correcting the actual effects of past discrimination. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring in part and concurring in the judgment); *Paradise*, 480 U.S. at 171 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). In particular, the policy, as applied, does not permit an inquiry to determine whether any particular minority applicant was in fact not disadvantaged by past discrimination. As Judge Williams observed, "it is hard to see how a program can be 'narrowly tailored' as a remedy for societal discrimination if competitors have no opportunity to show that individual beneficiaries have suffered no impairment of their license-securing ability attributable to that discrimination." Pet. App. 43a-44a.

To be sure, as the court of appeals pointed out, "minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses," Pet. App. 14a, and the Commission will not even consider that factor where an applicant has a clear quantitative advantage over its rivals. See p. 2, *supra*. But the fact that explicit consideration of race or ethnic background may not be dispositive in every case does not mean that such consideration is "narrowly tailored" in a constitutionally relevant sense. For example, it does not mean that the policy will be applied only to those who are truly disadvantaged or only when it will not injure innocent third parties. As this case suggests, minority ownership can be the determinative factor in a comparative license proceeding, whether or not a minority applicant can show he has been disadvantaged. Pet. App. 10a. And as Judge Williams noted, the FCC's policy can clearly injure third parties; indeed, "Rainbow's victory, in which the minority preference was dispositive, deprived the other competitors of their only chance for a new license for the foreseeable future." *Id.* at 44a. Thus, the fact that the Commission's preferences do not affect every case at most limits the class of those with standing to challenge the policy to those actually injured by its application to them.

B. 1. The second asserted justification for the minority preference policy—and the one on which the Commission prin-

cipally relies—is to further diversity of programming. See, *e.g.*, Pet. App. 11a n.6, 19a. This asserted justification is clearly different from any of the rationales previously considered by this Court in support of minority preference programs, including the interest in promoting "racial diversity" in higher education, which Justice Powell found to be a compelling governmental interest in his opinion in *Bakke*. See 438 U.S. at 311-315; see also *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting). No issue is presented here as to whether promoting "racial diversity" may *ever* constitute a compelling governmental interest;[13] the only question is whether racial preferences may be adopted because of their asserted instrumental value in promoting an entirely different type of "diversity"—diversity in programming.

a. There is reason to question whether that justification, as applied to the public broadcast spectrum, may ever qualify as a compelling governmental interest. This Court has long recognized that "the widest possible dissemination of information from diverse * * * sources is essential to the welfare of the public" and is plainly a legitimate governmental interest. *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); see, *e.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978). Nevertheless, the Court has never held that such a quest for diverse information is a sufficiently compelling justification for the government's use of a racial classification. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). "Programming diversity," and the related notions of "minority" or "nonminority" programming, are "elusive concepts, not easily defined let

[13] The FCC has not suggested that it may seek to promote diverse ownership as an end in itself. As Justice Powell stated, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307; accord *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 735, 739 (Scalia, J., concurring in the judgment). The FCC's programming diversity rationale is more akin to the argument that preferences should be given to minority applicants to medical schools in order to ensure a sufficient number of doctors willing to serve minority communities—a justification Justice Powell specifically rejected as unwarranted by the evidence in *Bakke*. See 438 U.S. at 310-311.

alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *National Citizens Comm. for Broadcasting*, 436 U.S. at 796-797. Moreover, the programming diversity rationale appears to require official identification and labelling of, among other things, "Black," "Hispanic," and "Aleutian" programming and viewpoints, and indulging in the assumption that we can tell how someone will *think* and *act* based solely on the color of his skin. This type of racial stereotyping is anathema to fundamental constitutional principles. *E.g.*, *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 735, 739 (Scalia, J., concurring in the judgment); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); *Wygant*, 476 U.S. at 274-276 (plurality opinion); *Loving* v. *Virginia*, 388 U.S. at 10-11.

b. Even if programming diversity might in theory qualify as a compelling governmental interest, the next question would be whether Congress itself has adopted this justification.[14] Here again, Congress has never enacted a statute expressly directing or authorizing the Commission to prefer minorities in comparative license proceedings in order to increase programming diversity. It has only directed the Commission to preserve the status quo with respect to an FCC policy originally justified on such grounds. See pp. 19-20, *supra*. To be sure, the legislative history of the various appropriations riders suggests that individual members of Congress approved of that rationale, see, *e.g.*,

[14] Questions about whether Congress could be said to have the power to adopt a minority preference policy for the broadcasting industry under Section 5 of the Fourteenth Amendment (see note 10, *supra*) are compounded when the rationale for such a policy is based on the need to enhance programming diversity, rather than to remedy past discrimination. The Section 5 power extends only to the enforcement of Section 1's guarantee that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." The goal of programming diversity, however, is not derived from the Equal Protection Clause, but rather from the policies of the Federal Communications Act. Thus, although the Court need not reach the question, we think it very doubtful that a congressionally mandated program of minority preferences designed to enhance the diversity of programming could be justified as an exercise of Congress's power under Section 5.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings); 133 Cong. Rec. S14,395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). But Congress may work its will only by enacting legislation, cf. *INS* v. *Chadha*, 462 U.S. 919, 952 (1983), and general statements contained in the legislative history—which were not voted on by the Congress, perhaps not even seen by many of its members, and certainly not presented to the President—cannot substitute for an express statutory provision mandating the use of preferences. See pp. 14-15, *supra*; cf. *Tafflin* v. *Levitt*, No. 88-1650 (Jan. 22, 1990), slip op. 3-4 (Scalia, J., concurring).

c. In any event, even if it could be said that Congress had expressly directed the Commission to award minority preferences in order to enhance programming diversity, it cannot be said that Congress had an adequate basis in fact to support the imposition of such an inherently suspect racial classification. As Judge Williams observed (see Pet. App. 22a), in order to demonstrate the need for racial preferences on this score, it would be necessary to show three things: (1) that different racial or ethnic groups have distinctive listening or viewing tastes; (2) that one or more of these distinctive racial or ethnic tastes are being undersupplied by today's broadcasting industry; and (3) that increasing the percentage of minority owners would overcome the shortage of programming that serves these distinctive tastes. To the extent that Congress even perceived the need to resolve these questions, however, it merely assumed the answers. There is scattered anecdotal evidence offered by various individuals and interest groups in congressional hearings that might support one or more of these propositions.[15] But the pertinent dimensions of the problem

[15] See *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [*1989 Hearing*]; *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

remained "unmeasured, unexplored, or unexplained" by Congress. *Croson*, 109 S.Ct. at 735 (Kennedy, J., concurring in part and concurring in the judgment). Where, as here, Congress has not affirmatively enacted legislation based on any finding that race is a reliable proxy for programming choices, such an unfocused gathering of information is an inadequate basis for invoking an otherwise suspect racial classification.[16]

Nor does the administrative history of the FCC policy offer anything to fill "this evidentiary void." Pet. App. 23a (Williams, J., dissenting). The Commission initially adopted its policy not after any careful study of the need for additional programming diversity and the relationship between ownership and programming, but rather at the direction of the court of appeals for the District of Columbia Circuit. See pp. 2-3, *supra*. The court of appeals, in turn, merely assumed that there was inadequate "minority" programming, and that increased minority ownership would rectify this shortcoming. See *Garrett*, 513 F.2d at 1063.

The administrative record compiled by the Commission, such as it is, confirms that the Commission also acted on the basis

[16] In the court of appeals, the Commission suggested that Congress could have properly relied on a recent report filed by the Congressional Research Service that purports to document a correlation between minority ownership and diverse programming. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988); see FCC C.A. Br. 46-47. That report, for the reasons stated by Judge Williams (see Pet. App. 23a-29a), is so fundamentally flawed as to deprive it of any significance.

In any event, apart from one passing reference to that report in the pertinent legislative record, see 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings), there are no indications that Congress even considered, let alone accepted, the tentative findings in the CRS survey in connection with maintaining the appropriations provision blocking the FCC's inquiry proceeding. Indeed, Senator Inouye, a leading proponent of the Commission's minority preference policies, recently acknowledged that Congress "need[s] to demonstrate that minority * * * ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves." *1989 Hearing* at 2.

of untested assumptions.[17] In fact, the Commission has candidly admitted the lack of an evidentiary predicate for the preference policy. In 1986, the FCC conceded that no Commission proceeding establishes as a fact that

> the race • • • of an owner necessarily has a direct nexus to program content. • • • The substantial deference normally accorded the Commission's judgmental and predictive determinations cannot justify reliance on suspect classifications to enhance program diversity in the absence of a clear and specific foundation upon which to base its conclusion. Here the agency needs a factual basis to support the assumed nexus, but none has ever been established.

Brief for FCC on Rehearing En Banc at 27-28, *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). It was precisely for that reason that the Commission initiated its inquiry proceeding in December 1986. See note 1, *supra*. Congress, however, terminated that investigation, see note 4, *supra*, and thus the Commission has been unable to determine whether the asserted purpose of the minority preference policy adopted over a decade ago has or ever had any factual support.[18]

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[17] For example, the *1978 Policy Statement*, 68 F.C.C.2d at 981, quotes the *Task Force Report*. The *Task Force Report*, in turn, relies on decisions such as *TV 9* and *Garrett* for its endorsement of the proposition that increased minority ownership will promote "greater diversity in the media." *Task Force Report* at 4; see *id.* at 4-6.

[18] Recent developments in broadcasting undermine the proposition that there is a lack of diversity in (or that minority viewpoints are not being served by) current programming. In abandoning the "fairness doctrine," the Commission determined intervention was no longer necessary to ensure balanced broadcast presentation on matters of public interest because there are now a "sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance." *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 208 (1985); see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, No. 89-312 (Jan. 8, 1990). The Commission has also recognized that those changes in the marketplace

> have resulted in [a] • • • rich array of information and entertainment programming, and, further, that this phenomenon of increased competition driving increased program diversity will continue. These findings demonstrate that in the current environment there is little if any basis to assume that racial or gender preferences are essential to the availability of minorities' and women's viewpoints. Thus, rather than there being a record to demonstrate that these preferences are essential, what record is available suggests otherwise.

Brief for FCC on Rehearing En Banc at 26-27, *Steele* v. *FCC*, *supra*.

2. Putting aside the evidentiary difficulties with the "programming diversity" rationale, that policy is not "narrowly tailored" to achieve the asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained. This Court has made clear that such a feature, which renders the preference policy potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future," *Wygant*, 476 U.S. at 276 (plurality opinion), precludes the use of a racial classification. See, *e.g.*, *Croson*, 109 S. Ct. at 723 (plurality opinion); *Paradise*, 480 U.S. at 171 (plurality opinion). As Judge Williams observed, "[p]lainly there can be no assurance of an end to the racial preference if there is no way—except the Commission's conclusory say-so—of ascertaining when the goal is reached." Pet. App. 27a.

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Apart from the substantial doctrinal flaws identified above, the Federal Communications Commission's use of a racial classification cannot overcome a more fundamental hurdle—the prerequisite of coherence. The Commission's use of racial preferences remains today as much as ever a policy in search of a purpose and an adequate supporting record. That policy was conceived by a court, Congress has refrained from enacting affirmative legislation, and the Commission has been blocked from completing the administrative inquiry proceeding it determined was necessary to justify its own policy. This confused state of affairs now leaves this Court to speculate about the reasons for the policy and to piece together an appropriate supporting record. Racial classifications, when imposed by the government, must at a minimum reflect the deliberate judgment of a competent

authority that such measures are necessary for specific purposes. Because that predicate is plainly absent here, the Commission's policy cannot be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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OCTOBER TERM, 1989

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE UNITED STATES SENATE

The petitioner has presented to this Court a question about the constitutionality of acts of Congress which, since December, 1987, have required the Federal Communications Commission ("FCC") to adhere to a policy, previously adopted by the FCC, for promoting ownership by minorities and women of television and radio stations. The portion of the policy that is directly involved in this case requires the FCC to give credit for, among a number of factors, ownership by minorities in evaluating competing applications for new stations. While the FCC is defending its policy and the legislation that has required its implementation, the Acting Solicitor General, on behalf of the United States, has joined in petitioner's challenge to their constitutionality.

The interest of the Senate in this case is grounded in the conviction that the legislation the Congress has enacted to require the continuation of the FCC's policy is a measured and constitutional effort to overcome past inequities and to advance the legitimate public interest in diversity of programming. Accordingly, the Senate has authorized the filing of this brief pursuant to 2 U.S.C. §288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." [1]

STATUTORY PROVISIONS INVOLVED

This case involves identical provisions of statutes providing appropriations for the Federal Communications Commission for fiscal years 1988, 1989, and 1990. The current provision was enacted as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989), and states that

> [N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 6[9] F.C.C. 2d 607 [(]Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a

[1] *See* S. Res. 251, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S1775-76 (daily ed. Feb. 27, 1990) (directing appearance in this case). Permission for the Senate to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. §288*l*(a).

> lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .

SUMMARY OF ARGUMENT

Congress's decision to keep the FCC's minority ownership policy in place is based on a record, compiled over two decades, of concern with the limited participation of minorities in the broadcast industry. Over the course of that time, Congress came to recognize that the unequal distribution of control over broadcast outlets was attributable in part to the effects of past discrimination and had disserved the public's interest in diverse radio and television programming. In order to ensure both that minorities could share in a vital and limited public resource, and that the public could benefit from their contributions to programming, Congress has required the FCC to continue a policy that works in modest ways to facilitate their entry into the field.

1. Congress first examined the problem of lack of minority participation in the broadcast industry in the late 1960s and early 1970s when it considered, but did not adopt, legislation that would have limited competing applications for existing licenses. Witnesses representing the interests of minority groups appeared at congressional hearings to state their concern that adoption of the legislation would further encumber the opportunity for minorities to obtain access to the media. The Congress was informed of the dearth of minority ownership of television and radio stations, and learned of the difficulties minorities faced in purchasing existing licenses or obtaining the limited number of new licenses that became available. This testimony was presented against the background of the Kerner Commission Report on the contribution of an essentially "all-white" media to racial disorders. As a result, Congress recognized that minorities faced a unique set of barriers that prevented their entry into the broadcasting field and that in the absence of

their participation, their perspectives and ideas were not being presented to the public.

2. From 1978 to 1983, concerned with the profound impact that the lack of minority contributions to programming had on both minority and nonminority audiences, the executive branch, the FCC, and the Congress acted to remedy that deficiency by enhancing the opportunities for minority ownership of broadcast licenses. The executive branch sought the implementation of a remedial program, including a grant of a preference to minorities in comparative hearings for licenses, in order to redress the historical problems which minorities faced in seeking broadcast ownership. The FCC adopted the policy which is the subject of this litigation. Then, in 1982, the Congress gave legislative support to the policy when, in authorizing a lottery for new licenses, the Congress provided for a preference for minorities in order to remedy the effects of past discrimination and to promote diversity in radio and television programming.

3. While proceeding to examine a range of minority issues in broadcasting, Congress has relied on the existence of the FCC ownership policy as a foundation of future policymaking. When the FCC determined that it would suspend the policy pending a reevaluation, Congress enacted legislation, first in 1987 and again in 1988 and 1989, to require the continued implementation of the policy.

4. The history of the minority ownership policy demonstrates that Congress had substantial evidence developed over a twenty-year period from which to conclude that the limited minority participation in broadcasting was attributable to the effects of past discrimination and that it disserved the goal of programming diversity. The policy is a measured and constitutional response to the persistent national problem of limited minority participation in broadcasting.

ARGUMENT

THE CONGRESS'S RATIFICATION OF THE FCC'S MINORITY OWNERSHIP POLICY IS GROUNDED ON TWO DECADES OF CONCERN WITH THE LIMITED PARTICIPATION OF MINORITIES IN BROADCASTING

Petitioner's characterization of Congress's ratification of the FCC's minority ownership policy as enactments "buried in appropriations measures, rather than constituting a 'considered decision of Congress and the President,'" Pet. Brief at 49 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980)), fails to credit the fullness of Congress's consideration of the need to redress the lack of minority participation in broadcasting. The determination to require the FCC to continue to adhere to its policy was a considered decision based on a record developed over two decades. As Justice Powell's concurring opinion in *Fullilove* explains, restricting a reviewing court to the immediate legislative history of an act, such as the appropriations acts in question in this case, "would erect an artificial barrier to [a] full understanding of the legislative process." *Id.* at 502. The "special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." *Id.* at 502-03.[2] The principal objective of this brief is to marshal more fully for the Court's consideration the experience of the Congress with the problem of limited minority participation in broadcasting.

Since the late 1960s, Congress—informed by the courts, national advisory commissions, the FCC, witnesses at congressional hearings, and, notwithstanding its current position, by the executive branch—has considered the uneven distribution of ownership of television and radio

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[2] *See also id.* at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."

stations. During the twenty years in which minority broadcasting issues have been the subject of its scrutiny, the Congress has come to recognize that increased minority participation in the ownership of broadcasting outlets is essential not only to remedy the effects of past discrimination that impeded access of minorities to the industry, but also to benefit the entire population by increasing the diversity of voices heard over the nation's airwaves. Attention to the entire record before the Congress will show not only the basis on which it has legislated, but also the consensus that developed among all three branches of government, at the time of the formation of the current policy in 1978, that positive government action was essential to encourage minority access to a vital and limited public resource.

A. A DECADE OF CLOSE SCRUTINY OF MINORITY PARTICIPATION IN BROADCASTING PRECEDED THE FCC'S ADOPTION OF A MINORITY OWNERSHIP POLICY IN 1978

In the late 1960s, a number of forces combined to bring under congressional scrutiny the causes and effects of the lack of minority participation in the broadcast industry. In 1966, the District of Columbia Circuit, to which the Congress has assigned a special role in reviewing FCC decisions, reversed the dismissal by the FCC of a petition contending that a Jackson, Mississippi television station "did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes," and held that the FCC must permit responsible members of the listening public to contest the renewal of broadcast licenses. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 998, 1005 (D.C. Cir. 1966). Articulating the central rationale for such "consumer actions," Circuit Judge Burger observed that a broadcaster "is granted the free and exclusive use of a limited and valuable part of the public domain," which is "burdened by enforceable public obligations." *Id.* at 1003.

The court of appeals decision was soon followed by the Kerner Commission Report, which concluded that an essentially "all-white" media had contributed to racial disorder in the 1960s by failing to portray minority perspectives and images. President Johnson had appointed the Commission in 1967 to investigate the cause of racial disorder and to recommend measures to prevent future disorder. The resulting report concluded that the media had contributed to racial unrest in at least two respects. First, it had failed to communicate to its white audience an understanding of black culture, thought, and history. Second, by portraying blacks as whites saw them, rather than the way they saw themselves, it had failed to communicate to its black audience. *Report of the National Advisory Commission on Civil Disorders* 210 (1968). In the Commission's words, "[b]y failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country." *Id.* at 211.

Recognizing that the government could not correct this failure by controlling program content, *id.* at 203, the Kerner Report observed that an alternative approach was to increase the number of minorities employed in the industry. *Id.* at 211–212. The Department of Justice added its understanding that equal employment opportunity in the broadcast industry could " 'contribute significantly toward reducing and ending discrimination in other industries' " because of the " 'enormous impact which television and radio have upon American life.' " [3] In response, the FCC announced in 1968 its commitment to increasing employment of minorities in the broadcast industry. *See id.* at 774–75.

Following the court's lead in *Church of Christ*, the FCC implemented an additional means to encourage responsive programming. In *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), the Commission held that a licensee who applied for renewal would receive credit for past performance only to

[3] *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 771 (1968) (quoting letter of Assistant Attorney General Stephen J. Pollak).

the extent that its performance indicated that it offered the best practicable service. This decision signaled a major departure from the FCC's prior approach of awarding substantial credit for past performance automatically, which had largely guaranteed that incumbent licensees would always prevail in license renewal hearings. Together with *Church of Christ*, the FCC's new approach to comparative renewal hearings commenced a new era of public scrutiny of the broadcast industry's practices.

Against this background of increased public participation in the licensing process and attention to the performances of broadcast licensees, Congress for the first time confronted the barriers to minorities that inhered in the structure of the broadcast industry. In 1969, partly in response to *WHDH*, Senator Pastore had introduced a bill that would have eliminated the comparative renewal hearing by prohibiting the FCC from considering a competing application for a facility, unless and until the FCC found that the incumbent had failed to serve the public interest. *See Amend Communications Act of 1934: Hearings on S. 2004 Before the Communications Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., pt. 1, at 7–8 (1969). The bill's proponents maintained that the threat to a licensee of having to defend a costly renewal action every three years would discourage investment and innovation in the industry. *See id.* at 11 (statement of Sen. Moss).

The bill was strenuously opposed on the grounds that the opportunity to challenge existing stations was crucial, both as a means of ensuring a responsive media and as a way that previously excluded groups could enter an essentially closed industry. Earle Moore, General Counsel to the National Citizens Committee for Broadcasting and attorney for the petitioner in *Church of Christ*, testified that because the most valuable broadcast licenses had all been assigned long ago, excluded groups, particularly blacks, had to gain entry into the broadcasting industry through competitive applications against substandard sta-

tions.[4] Another witness pointed out that, out of 7,000 existing radio and television stations, only 7 radio stations and no television stations were owned by blacks. *Id.*, pt. 2, at 602 (testimony of Absalom Jordan, Black Efforts for Soul in Television). John McLaughlin, who was then an associate editor of *America*, testified that the bill would "exclude minority groups from station ownership in important markets. . . . If this bill is passed, existing station licenses will be, for all intents and purposes, frozen." [5]

Before Congress acted on the Pastore bill, the FCC issued a policy statement in January, 1970, announcing that an incumbent would receive a controlling preference in a renewal hearing if it demonstrated substantial past performance without serious deficiencies.[6] The FCC statement failed to still the debate, however. The Civil Rights Commission reported to the President and to the Congress that, "it appears that [the FCC policy] necessarily will discourage license competition and tend to exclude minority participation in the ownership of broadcasting stations," [7] and the District of Columbia Circuit held that the FCC policy violated the Communications Act of 1934. *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (1972) (per curiam).

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[4] *Id.* at 128. Moore acknowledged that the petition to deny process sanctioned in *Church of Christ* had enabled excluded groups to have some impact on programming, but pointed out that the expense of those proceedings rendered them an impractical alternative. *See id.* at 136–37.

[5] *Id.* at 642. Clearly troubled by the potential impact of his bill on minorities, Senator Pastore observed that, "I feel that the course of events . . . have been such that maybe the black community has not been allowed—I don't know through what mechanism or through whose fault—a fair share of the broadcasting industry." *Id.* at 421. He maintained, however, that providing them with access to comparative hearings would not remedy the problem. *Id.* at 422.

[6] *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970).

[7] United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 858–59 (1970) (footnotes omitted).

The court was troubled that the FCC's proposed summary procedure would have the effect of frustrating the first amendment goal of achieving diversity of expression at a time when, "[a]s new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." The "uncontested testimony" that "no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities" prompted the court to observe that the FCC's rule would "perpetuate this dismaying situation." [8]

The debate over how to resolve the conflict between the interest of broadcasters in stability and the desire of minorities for access to the broadcast field returned to the Congress when House and Senate committees held extensive hearings in 1973 and 1974 on proposals to extend the broadcast license period from three years to five years and to modify the comparative hearing process.[9] In greater numbers than during the 1969 hearings, organizations representing the interests of minorities came forward to testify that policies that reduced the opportunities for citizens to challenge existing licensees either by challenging license renewals, as permitted in *Church of Christ*, or by competing applications, which were given new life by

[8] 447 F.2d at 1213 n.36. While recognizing an interest in industry stability, the court found that the policy instead induced "*rigor mortis.*" *Id.* at 1214 & n.38 (noting findings of the Commission on Civil Rights that comparative hearings had been " 'an effective mechanism for bringing about greater racial and ethnic sensitivity in programming, nondiscriminatory employment practices, and other affirmative changes which otherwise might not take place' " (quoting U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 283 (1971)).

[9] *See Broadcast License Renewal: Hearings on H.R. 5546 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess., pts. 1 & 2 (1973) ["*1973 House Hearings*"]; *Broadcast License Renewal Act: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93rd Cong., 2d Sess., pts. 1 & 2 (1974)["*1974 Senate Hearings*"].

WHDH, threatened to perpetuate a status quo that excluded minorities. Witnesses reported that renewal proceedings had been used to challenge the practices that the Kerner Report had criticized: employment discrimination, the lack of responsiveness to minority views, and the failure to portray minorities either at all, or other than in stereotypical ways.[10]

Witnesses also stressed that the renewal process provided a practical way for minorities to obtain a foothold in the industry. Minorities had been unable to obtain licenses at a time when they were essentially free. In 1973, those same licenses were worth upwards of $50 million in major markets. Only those who had the necessary capital and broadcast experience could afford to purchase existing licenses or obtain the few new ones that became available. *See 1973 House Hearings*, pt. 2, at 774 (statement of Dr. William Fore, National Council of Churches of Christ). The impact on minorities of this historical development of the industry was described as "a tax on blackness." *1974 Senate Hearings*, pt. 1, at 297 (testimony of James McCuller, National Black Media Coalition).

While the Congress was declining to adopt the proposals that were so strongly challenged in the Senate and House hearings in 1973 and 1974, the District of Columbia Circuit was determining that a policy of neutrality would not suffice to increase minority participation in the ownership of broadcast licenses. In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the court reversed the Commission's refusal to award merit for an applicant's minority ownership in a comparative hearing. Rejecting the FCC's argument that the Communications Act was colorblind, *id.* at 936, the court

[10] Groups representing Spanish-surnamed Americans and groups representing the interests of women testified that these practices had similarly affected them. *See, e.g., 1974 Senate Hearings*, pt. 2, at 785 (statement of Manuel Fierro, Raza Association of Spanish Surnamed Americans); *1973 House Hearings*, pt. 1, at 518–38 (statement of Whitney Adams, National Organization for Women).

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stated that the Act's public interest standard gave the FCC wide discretion to consider factors that would contribute to that goal. *See id.* ("Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to Black participation among principals of applicants for television rights.").[11]

B. FROM 1978 TO 1983 THE FCC, EXECUTIVE BRANCH, AND CONGRESS ADOPT POLICIES DESIGNED GRADUALLY TO INCREASE MINORITY OWNERSHIP

Building on the decade, described above, of growing attention to the limited minority participation in broadcasting, and informed by continuing concern about the portrayal of minorities in the media,[12] the executive branch, the FCC, and the Congress undertook from 1978 to 1983 to formulate policies that would operate in modest ways to increase minority ownership at the margins of the well-established broadcast industry.

In 1978, the executive branch actively encouraged both the FCC and the Congress to adopt measures to increase minority ownership. Turning first to the FCC, the Office of Telecommunications Policy (which at the time was part of the Executive Office of the President), and the Department of Commerce filed a petition with the Commission in January, 1978, proposing several minority ownership policies. Observing that "[m]inority ownership markedly serves the public interest, for it ensures the sus-

[11] The court was careful to point out that it was not recommending a quota system, but rather was deciding only that merit should be awarded when minority ownership was likely to increase diversity of content. *See id.* at 938 (explaining that ownership was relevant because it is "upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential"); *see also Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[12] The Civil Rights Commission submitted two reports to the President and the Congress on the inadequate portrayal of women and minorities in television: United States Commission on Civil Rights, *Window Dressing on the Set* (1977); United States Commission on Civil Rights, *Window Dressing on the Set: A Update* (1979).

tained and increased sensitivity to minority audiences," and noting that less than one percent of the nation's stations were owned or controlled by minorities, the executive branch suggested, among other things, that the FCC grant a "preference" to minorities in comparative hearings for licenses.[13]

Reflecting later on a degree of progress toward greater minority ownership, President Carter explained that the purpose of his 1978 proposal was twofold: to overcome past discrimination and to increase the range of voices heard over the airwaves. With respect to the first purpose, the President stated that the lack of minority ownership was attributable to "such obstacles as not having adequate financing, the lack of technical training because of discrimination and exclusion in the past, and a shortage of available stations to buy or to manage, because so many were assigned long ago when racial discrimination was both a *de facto* and a *de jure* part of the American societal life." *Telecommunications Minority Assistance Program*, 1980–81 Pub. Papers 1703, 1704 (Pres. Carter). The lack of minority participation in broadcasting, the President stated, was "one of the roots of the slow progress in the elimination of discrimination and the enhancement of justice in our Nation in the past." *Id.*

Even prior to the Executive's January 1978 proposals, the FCC had begun to formulate a minority ownership policy by holding a conference on minority ownership in April, 1977. Building on a task force report,[14] as well as

[13] *See Telecommunications Minority Assistance Program*, 1978 Pub. Papers 252, 253 (Pres. Carter). The executive branch also suggested that the FCC adopt a Congressional Black Caucus proposal to permit sales at distress sale prices of stations designated for license renewal or revocation hearings to groups with at least 50 percent minority ownership. *Id.*

[14] The task force reported the views of conference participants that minority ownership policies were justified, both to increase diversity of viewpoint, FCC Minority Ownership Taskforce, *Report on Minority Ownership in Broadcasting* 4–6 (1978), and to remedy the effects of past discrimination that had resulted in an unequal distribution of broadcast licenses, *id.* at 6–8.

on the decisions of the District of Columbia Circuit regarding comparative license proceedings, the FCC adopted in May, 1978, a *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978). The FCC found that in spite of progress in ascertaining the needs and interests of the communities served by licensees and in employment practices, "the views of racial minorities continue to be inadequately represented in the broadcast media." *Id.* at 980 (footnotes omitted). Seeking to increase diversification in programming while "avoid[ing] direct government intrusion into programming decisions," *id.* at 981, the FCC expressed its "commitment to increasing significantly minority ownership of broadcast facilities," *id.* at 982.

The FCC policy contained two elements. One was to provide encouragement through financial incentives for the assignment or transfer of existing licenses to minorities. *Id.* at 983 & n.19 (adopting "tax certificate" and "distress sale" policies). The other was to implement judicial decisions on the consideration of minority ownership as one factor in comparative proceedings for new licenses. Within a month, the FCC clarified its policy on granting merit for minority ownership in comparative hearings. In *WPIX, Inc.*, 68 F.C.C.2d 381 (1978), the FCC stated that all applicants in a hearing start on an equal plane and move up or down, with positive attributes such as integration of ownership and management lifting the applicant above the starting position. Minority ownership was to be considered an additional credit under the integration attribute, as were other positive factors such as community involvement and broadcast experience.[15] When the FCC

[15] *Id.* at 411. In July, 1978, the FCC extended its comparative evaluation policy to female ownership. *In re Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev. Bd. 1978) (noting that this credit was less significant than that for minorities), *set aside on other grounds*, 87 F.C.C.2d 203 (1981). *Mid-Florida* also involved a minority applicant. The minority applicant prevailed neither in *WPIX*, 68 F.C.C.2d at 412, nor in *Mid-Florida*, 69 F.C.C.2d at 655–56.

acted on the Executive's minority ownership petition in November, 1978, it pointed out that the Executive and the FCC were in substantial agreement "that past Commission actions taken to encourage minority ownership . . . are consistent" with this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).[16]

During 1978, both the FCC and the Executive presented their views on mirority ownership policies to Congress as Congress considered a major proposal to deregulate the broadcasting industry. The proposed Communications Act of 1978 would have, among other things, replaced comparative hearings with a lottery; it also would have created a fund for loans to minorities who sought to buy stations. The bill was the subject of extensive hearings in the House.[17] As described by Representative Markey, the bill was intended to increase "the opportunities for blacks and women and other minorities in this country to get into the communications systems in this country so that their point of view and their interests can be represented" without interfering with the rights of existing licensees. *1978 House Hearings*, vol. 5, pt. 1, at 59. The sponsor of the bill, Representative Van Deerlin, stated, "It was the hope, and with some reason the expectation of the framers of the bill, that the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be by doing something at the top, that is, increasing minority ownership and management and control in broadcast stations."[18]

[16] *In re Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 F.C.C.2d 1591 n.1 (1978).

[17] *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) ["*1978 House Hearings*"].

[18] *Id.*, vol. 3, at 698 (noting that inadequacies of present licensing system had left minorities with only 1 television station out of 755 and 41 out of 7,500 commercial radio stations).

The executive branch objected to the lottery proposal because it would harm minorities by eliminating the credit granted under the existing comparative hearing scheme as developed by the FCC. *See id.* at 50 (statement of Henry Geller, Assistant Secretary for Communications and Information of the Department of Commerce). Acknowledging that a lottery could be structured to ameliorate that concern by giving a weight based on minority ownership, *id.* at 85, the Executive explained that it preferred granting credit for minority ownership during comparative hearings as a more finely tuned way to achieve the Communications Act's public interest goal.[19] FCC Chairman Charles Ferris testified that a finding that "[m]inorities had gained a foothold in the medium through employment and ownership" should be a precondition to deregulation, *id.* at 108, and acknowledged that a "weighted lottery" was one way to pursue this objective. *Id.* at 118.[20]

[19] *Id.* (contending that a lottery would not take into account the individual needs of particular communities).

[20] Although no lottery legislation was enacted that year, Congress continued to explore the idea the following year. In the House, the proposed Communications Act of 1979 would have provided that any minority applicant for a license that had not previously been assigned would be counted twice in the pool. The provision was intended to increase minority representation in the ownership of broadcast stations, thereby achieving more diverse programming that would both serve minority communities and enhance the programming available to nonminority community audiences. Staff of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, *H.R. 3333, "The Communications Act of 1979" Section-by-Section Analysis,* 96th Cong., 1st Sess. 39–41 (Comm. Print 1979).

The 96th Congress considered two additional bills that related to the FCC's licensing process. S. 622 would have authorized a lottery selection process for new or revoked radio and television licenses, without a credit for minority ownership. *Amendments to the Communications Act of 1934: Hearings on S. 611 and S. 622 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation,* 96th Cong., 1st Sess., pt. 1, at 156, 177 (1979). S. 611 would have maintained comparative hearings but prevented the FCC

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When Congress finally authorized a lottery system for initial licenses or construction permits as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, 95 Stat. 357, 736–37 (1981), it determined that a system of preferences should be established. The Act provided that where more than one application for an initial license or construction permit involving any use of the electromagnetic system was received, the FCC could grant the license to a qualified applicant through the use of a lottery. But the Act also required the FCC to adopt rules that would ensure that "significant preferences" would be granted in the lottery process to groups underrepresented in the ownership of telecommunications facilities. As explained in the accompanying conference report, Congress intended to encourage

> ownership by minorities, such as blacks and hispanics, as well as by women, and ownership by other underrepresented groups, such as labor unions and community organizations. . . . These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met.

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 396, 1259.[21]

from considering in renewal hearings the multiple ownership or integration of ownership and management, the factor under which the FCC would give credit for minority ownership. *Id.* at 41, 141–42. During Senate hearings, the executive branch reiterated its opposition to a nonweighted lottery. *Id.*, pt. 3, at 2124 (statement of Assistant Secretary Geller).

[21] In the same statute in which it increased the opportunities for minorities to obtain new broadcast licenses, Congress increased the license period from three to five years. *See* Pub. L. No. 97-35, 95 Stat. at 736, *amending* 47 U.S.C. § 307(d). This effort to improve industry stability had long been opposed on the ground that it would limit the op-

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Although the lottery system Congress authorized in 1981 was consistent with lottery proposals that had been discussed with the Executive and the FCC since at least 1978, *see supra* at 15–16, the FCC did not implement the statute because, for a number of administrative reasons, the FCC believed that the lottery established by the statute would not produce the economies the Congress had sought to provide. The Commission also questioned the constitutionality under *Bakke* of granting a preference to minorities or women, expressing the belief that while the Commission may have found that these groups had suffered from discrimination, Congress did not appear to have done so in the lottery legislation.[22]

In response to the FCC's decision not to implement a lottery, Congress enacted a second lottery statute. Section 115 of the Communications Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094, amending 47 U.S.C. § 309(i), provided that in random selection lotteries, a preference shall be granted to any applicant whose receipt of a license would increase the diversification of ownership of mass media and that, "[t]o further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group." [23]

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portunities for minorities to enter the broadcast industry. *See supra* at 8–10.

[22] *In re Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 89 F.C.C.2d 257, 281 n.* (1982). Dissenting, Commissioner Fogarty doubted the validity of the suggestion that the preference policy might present constitutional concerns. *Id.* at 292 (pointing out that Congress had not required that a preference be controlling to the exclusion of any nonminority's chance to win).

[23] "Minority group" was defined to include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders." *Id.* at 1095, 47 U.S.C. § 309(i)(3)(C)(ii).

The accompanying conference report responded to the FCC's articulated concerns about the preference requirement. The conferees explained that Congress had two reasons for granting preferences to underrepresented groups. First, the Congress sought "to promote the diversification of media ownership and consequent diversification of programming content." *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2261, 2284 (observing that the nexus between ownership and programming "has been repeatedly recognized by both the Commission and the courts").[24] Second, with respect to racial and ethnic minorities, the preference was intended to remedy "the effects of past inequities stemming from racial and ethnic discrimination [which] have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." [25]

More generally, the conferees made clear that the Congress did not view the lottery system in isolation from the values served by the Commission's comparative licensing process. As expressed by the conferees,

> if the traditional comparative process would provide a superior means of diversifying media ownership in particular instances, a service should not be subject to a lottery when to do so would undermine or thwart this policy goal. . . . Diversification of media ownership and information are central goals

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[24] In response to concerns of the Commission, the Congress made the preference requirement applicable to media of mass communications and not to common carriers, which do not control the content of the information they carry. *See id.* at 41, 1982 U.S. Code Cong. & Admin. News 2285.

[25] *Id.* at 43, 44, 1982 U.S. Code Cong. & Admin. News 2288 (citing *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Taskforce, *Report on Minority Ownership in Broadcasting* (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). The conference report on the lottery bill parallels a report of the House Committee on Energy and Commerce. *See* H.R. Rep. No. 751, 97th Cong., 2d Sess. (1982).

> of the traditional comparative licensing process, and continued promotion of these goals should not be sacrificed merely because a lottery may be more expedient.

Id. at 37-38, 1982 U.S. Code Cong. & Admin. News 2281-82. For this reason, the conferees declared their "firm intent . . . that traditional Commission objectives designed to promote the diversification of control" be incorporated into the administration of a lottery system. *Id.* at 40, 1982 U.S. Code Cong. & Admin. News 2284.

With these new directions from Congress, the FCC adopted rules to govern the use of a lottery.[26] The FCC agreed that the program was constitutional, given that the conferees "found that past discrimination has resulted in severe underrepresentation of minorities in media ownership"; that the preference for race was only one of several factors considered; and that the Congress intended to receive information annually about the program in order that it may "further tailor the program based on that information, and may eliminate the preferences when appropriate." [27]

C. THE CONGRESS ACTS TO ASSURE CONTINUATION OF THE MINORITY OWNERSHIP POLICY

Shortly after the convening of the 98th Congress in 1983, the Senate passed a comprehensive broadcast de-

[26] These rules were preceded by the FCC's 1982 Policy Statement announcing that, based on the Report of its Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, it would expand the distress sale and tax certificate policies and expedite the processing of distress sales. *See In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 52 Rad.Reg.2d (P&F) 1301 (1982) (responding to Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, *Strategies for Advancing Minority Ownership Opportunities in Telecommunications* (1982)).

[27] *See In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 F.C.C.2d 952, 974 (1983).

regulation bill which, among other matters, would have eliminated comparative procedures for license renewals.[28] While the Senate bill was silent on minority ownership issues, proposals to codify and expand provisions for minority ownership of broadcast facilities were the subject of extensive hearings in the House in 1983 and 1984.[29] No legislation was enacted.[30]

Within two years of the 1984 hearings, the minority ownership question returned to the Congress when a House committee held a hearing in October, 1986, on issues raised by the FCC's September 12, 1986 brief in *Steele v. FCC*, No. 84-1176 (D.C. Cir.), in which the Commission requested a remand to consider the constitutionality of its preference policy.[31] After the court granted

[28] S. 55, 98th Cong., 1st Sess. (1983), 129 Cong. Rec. 2420-24 (1983).

[29] *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) (exploring the impact of broadcast deregulation on efforts to improve minority ownership); *Parity for Minorities in the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) (Minority Telecommunications Development Act of 1983); *Broadcast Regulation and Station Ownership: Hearing on H.R. 6122 and H.R. 6134 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2nd Sess. (1984) (considering minority preference for new licenses for broadcast properties and new technologies).

[30] *See* Congressional Quarterly, *Almanac: 98th Congress, 2d Session. . . . 1984*, vol. XL, at 286 (1985).

[31] *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 1, 10 (1986) (addressing, in addition to the FCC's request to restudy its preference policies, a bill to eliminate discrimination by advertisers). The Chairman of the House Subcommittee on Telecommunications, Representative Wirth, expressed the view that, "[t]he most important message of this hearing today, is that the Commission must not dismantle these longstanding diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts

Continued

the remand request, the FCC commenced an examination of the constitutionality of its comparative preference, distress sale, and tax certificate rules. In its December 17, 1986 order on that inquiry, the FCC directed its administrative law judges and officials to hold in abeyance actions on licenses and distress sales in which a preference would be dispositive.[32]

In response to the FCC's announcement that it would no longer employ its minority ownership policy until it had concluded an inquiry into its constitutionality, a number of bills proposing codification of the policy were introduced in Congress.[33] In search of an appropriate legislative response to the Commission's actions, members questioned the FCC during hearings over a span of six months in 1987 on the FCC appropriation for fiscal year 1988,[34] on legislation to reauthorize the Commission for

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direct otherwise." *Id.* at 13. One reason that the FCC's action seemed inexplicable to members was that the District of Columbia Circuit had determined that the comparative hearing preference was constitutional, *see West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), and this Court had declined to review that decision. 470 U.S. 1027 (1985).

[32] *In re Reexamination of the Commission's Comparative Licensing Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315, 1319 (1986), *as amended*, 2 F.C.C. Rcd 2377 (1987).

[33] *See* 133 Cong. Rec. 860 (1987) (H.R. 293); 133 Cong. Rec. 3300 (1987) (H.R. 1090); 133 Cong. Rec. 9744 (1987) (S. 1095); 133 Cong. Rec. 13742 (1987) (S. 1277).

[34] *Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17 (1987) (statement of Sen. Lautenberg) (questioning why the FCC was dissatisfied when the Congress and the courts had approved the policy).

fiscal years 1988 and 1989,[35] and on legislation to codify the Commission's minority ownership policy.[36]

Instead of permanently codifying the policy, Congress employed its appropriations power to keep the FCC's minority ownership policy in place for fiscal year 1988. The report of the Senate Committee on Appropriations restated the long-standing conviction of the Congress "that promoting diversity of ownership of broadcast properties satisfies important public policy goals," and that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). The committee emphasized that Congress had explicitly approved the use of preferences to promote minority and female ownership when it authorized the use of lotteries in 1982, and referred to the conference report on that legislation, a report which described the Congress's interest both in eradicating the effects of discrimination and in promoting diversity in programming. *Id.* at 77.

The Senate passed the committee bill in October. Speaking in favor of the bill, Senator Lautenberg expressed the concern that the FCC's actions threatened to halt progress that had been achieved during the preceding decade. 133 Cong. Rec. S14395 (daily ed. Oct. 15, 1987) ("As recently as 10 years ago, there were fewer than 60 minority-owned broadcast licenses. Now, there are 250. The FCC has not only cast doubt on future progress in this area, it has clouded the status of current license applicants."). Final enactment of the legislation occurred in December, 1987, Pub. L. No. 100-202, 101 Stat. 1329,

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[35] *FCC Authorization: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 55 (1987); *FCC and NTIA Authorizations: Hearings on H.R. 2472 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 130-31, 211-12 (1987).

[36] *Broadcasting Improvements Act of 1987: Hearings on S. 1277 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 51 (1987).

1329–31 (1987), after the Congress and the President resolved budgetary and other issues that had delayed the enactment of all appropriations for fiscal year 1988.[37]

In 1989 and 1990, Congress carried forward for additional fiscal years the decision to keep the FCC's policy in place. In debate on the fiscal year 1989 legislation, Senator Hollings, chairman of both the authorizing committee and appropriations subcommittee for the FCC, presented to the Senate a summary of a June 1988 report prepared by the Congressional Research Service, entitled "Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?". The report analyzed data the FCC had collected during its preference policy inquiry. The study, Senator Hollings reported to the Senate, "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." 134 Cong. Rec. S10021 (daily ed. July 27, 1988).[38]

D. CONGRESS'S DETERMINATION TO REQUIRE CONTINUATION OF THE MINORITY OWNERSHIP POLICY IS BASED ON A CONSIDERED CONGRESSIONAL JUDGMENT THAT THE POLICY IS ESSENTIAL TO ERADICATE THE EFFECTS OF PRIOR DISCRIMINATION AND TO ACHIEVE DIVERSITY OF PROGRAMMING

The history of the minority ownership policy shows that Congress strove to ensure that minority participation in broadcasting would be increased in a way that was respectful of other values. As this Court has recognized, Congress's decision to allocate the limited number of broadcast frequencies to licensees, who in return must

[37] Congressional Quarterly, *Almanac, 100th Congress, 1st Session . . . 1987*, vol. XLIII, at 480–88 (1988).

[38] Even as the litigation over the FCC's minority ownership policy has proceeded, Congress has continued to examine, as it has over the past twenty years, the problem of how to increase minority ownership of broadcast stations. *See Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. (1989).

act as public trustees, has resulted in a "delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). Within that context, assuring minorities an opportunity to fully and meaningfully participate in the system has presented a particularly difficult problem. From the first time that Congress was confronted with statistics that described an industry which was nearly devoid of minority participation at any level,[39] it also was confronted with several well-understood facts that shaped its response.

To begin with, the government had distributed this valuable public resource at a time when undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation. Numerous factors, "difficult to isolate or quantify," *Fullilove*, 448 U.S. at 461, have continued to preclude minorities from effective participation. It is not only that "minority groups have fewer financial resources than nonminorities," U.S. Brief at 21, although that is true and has its roots in the nation's history. But as the executive branch itself has recognized, minorities have also encountered "barriers to technical training and employment opportunities" in broadcasting. *Telecommunications Minority Assistance Program*, 1978 Pub. Papers 253 (Pres. Carter). Burdened by denial of experience in the industry with "disabilities caused by an inadequate 'track record,'" lack of awareness of opportunities, and lack of knowledge of the licensing process, *see Fullilove*, 448 U.S. at 467 (listing similar factors), minorities "through no fault of their own," *id.* at 461, were impeded from competing successfully for licenses when they were first awarded and as they became available in the market. Thus, as in *Fullilove*, the "Congress could take necessary

[39] *Cf., e.g., Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.) ("Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises").

and proper action to remedy the situation," and "[i]t is not necessary that [the FCC or any particular broadcasters] be shown responsible for any violation of antidiscrimination laws." *Id.* at 475.

Further, while the resulting unequal distribution of opportunity in the broadcast industry was unlikely to change at an acceptable rate without government intervention, the Congress recognized that its ability to remedy the problem was limited. Redistribution of existing licenses was out of the question, and first amendment considerations precluded Congress from dictating the content of the programs of licensees. Given these constraints, and that other efforts such as challenges to existing licenses had failed to significantly increase minority ownership, two opportunities for change have presented a measure of promise. One is to provide incentives to existing licensees to transfer their stations to minorities. The other is to increase the chance that qualified minority applicants would obtain new stations as they became available.

Congress's determination that the policy incorporating these measures strikes an appropriate balance between the interests of broadcast licensees on the one hand, and the national interests in providing equal opportunity to all citizens and access to diverse sources of expression on the other hand, is worthy of this Court's deference. Far from being "delphic action," U.S. Brief at 19, the legislation enacted by Congress represents a judgment building on years of consideration of how to provide at the margin of an established industry some opportunities for entry by minorities who had been excluded.

In light of the history of Congress's consideration of the problems of minority ownership in broadcasting, "it is inconceivable that Members of both Houses were not fully aware of the objectives of the [appropriations measures] and of the reasons prompting [their] enactment." *Fullilove*, 448 U.S. at 467. The formalistic view that this Court cannot regard the policy as an attempt by the Congress to

remedy discrimination because that intention was not made "unmistakably clear in the language of the statute," U.S. Brief at 15, ignores the twenty-year history evidencing that intent and would require the Court "to be blind to the realities familiar to the legislators." *Katzenbach v. Morgan*, 384 U.S. 643, 653 (1966).[40] Moreover, Congress did make an explicit finding of discrimination when enacting the 1982 preferential lottery legislation for licenses. That finding is relevant here because Congress perceived a strong relationship between the values served by the preference provisions of the lottery legislation and the comparative preference policy established by the FCC. *See supra* at *19-20*.

There is also a firm basis for the Congress's additional objective of increasing diversity by increasing minority ownership. That objective does not rest on the notion that all minority owners "will program their new broadcast stations in some sort of minority . . . manner." Pet. Brief at 38. Rather, it is based on the common sense understanding that an individual with a particular background may bring to a broadcast station experience, perspectives, and ideas that will enrich the rest of the public. *Cf. Bakke*, 438 U.S. at 314 (opinion of Powell, J.) (observing that selecting students on the basis of diverse features, including race, may enrich a university's student body). The consideration of minority ownership as one of several factors weighed in choosing among qualified applicants for new broadcast licenses is a measured and constitutional means to achieve this objective.

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[40] *See also Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.) ("Although the Act recites no preambulatory 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 89-453

In The

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Metro Broadcasting, Inc. (Metro). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government agencies will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the integrity of the government's broadcast licensing procedures. Allowing the Federal Communications Commission (FCC) to apply race preferences in comparative licensing hearings violates fundamental notions of fairness.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 873 F.2d 347 (D.C. Cir. 1989).

STATEMENT OF THE CASE

This case presents the issue of whether the equal protection component of the Fifth Amendment to the United States Constitution tolerates race preferences in comparative licensing proceedings for new broadcast stations.

The issue arose when Metro Broadcasting filed an application for a construction permit for a new television station in the Orlando, Florida, area. Rainbow Broadcasting Company (Rainbow) filed a competing application. FCC held a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended. 47 U.S.C. § 309(e).

In comparative licensing proceedings for new broadcast stations, FCC is required to grant licenses as "public convenience, interest, or necessity" requires. 47 U.S.C. § 307(a). To meet this mandate, FCC has adopted certain factors which must be considered in comparative hearings. The qualitative attributes or enhancement factors include the integration of the owners into the management, local involvement of the owners, and minority participation in ownership. The two most important factors are local residence and minority status. Metro prevailed on the local residence and civil participation attributes. However, Rainbow had a greater minority owner/management integration. In awarding the license to Rainbow, FCC on remand acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1478 (1987).

The Court of Appeals for the District of Columbia Circuit upheld the granting of a minority ownership preference to Rainbow against a constitutional attack.

SUMMARY OF ARGUMENT

FCC's policy of awarding substantial preference to minority ownership in comparative hearing proceedings violates nonminority individuals' constitutional rights.

As recognized by Justice Powell, "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring). In this case there was no finding of prior discrimination and the policy was applied solely to foster program diversity. Absent such a finding, nonminorities' constitutional rights to be treated as individuals are impermissibly infringed.

Because there is no finding of prior discrimination in the broadcast industry, the race-based preference policy below must be justified by some other compelling governmental interest. Neither underrepresentation of minority ownership in the broadcast industry nor program diversity provides FCC a goal important enough to warrant use of a race classification. Nor is FCC's program "narrowly tailored." First, it is not linked to identified discrimination and, second, it is clear that FCC did not consider whether alternative remedies might serve the FCC's purpose. Accordingly, FCC's minority preference scheme cannot withstand the strict scrutiny analysis

urged by amicus to test compliance with equal protection guarantees.

Absent a finding of prior discrimination, a government imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The equal protection guaranty protects individual rights and does not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

ARGUMENT

I

THE STRICT SCRUTINY STANDARD OF REVIEW SHOULD APPLY TO ALL RACE-BASED PROGRAMS

The constitutional challenge to FCC's race-based preference in the comparative broadcasting licensing proceedings has been brought under the implied equal protection guarantee of the Fifth Amendment. As discussed below, this program, as well as all race-conscious programs, should be reviewed under the strict scrutiny test.

A. Strict Scrutiny Is the Appropriate Standard of Review for Race-Conscious Programs

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This includes a race-conscious program approved by the federal government or a state or a local government.

The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to

"smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *City of Richmond v. J. A. Croson Company*, ___ U.S. ___, 102 L. Ed. 2d 854, 881-82 (1989) (plurality opinion of O'Connor, J.). Strict scrutiny analysis requires the satisfaction of two prongs. First, any racial classification must be justified by a compelling governmental interest and, second, the means chosen by the government to effectuate its purpose must be narrowly tailored to meet that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 285 (1986); *Croson*, 102 L. Ed. 2d at 881-82 (plurality opinion).

The decision in *Korematsu v. United States of America*, 323 U.S. 214 (1944), was the start of equal protection constitutional analysis. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the equal protection guarantee absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Korematsu*, 323 U.S. at 216.

This Court has not swayed from this standard of review when confronted with a classification based on race. In *Wygant*, this Court stated: "Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant*, 476 U.S. at 273 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.)).

Recently, in *Croson*, a majority of this Court held that race-based programs are suspect classifications subject to strict scrutiny by the courts. Plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice. 102 L. Ed. 2d at 882 (Scalia, J., concurring at 899).

B. Federally Approved Race-Conscious Programs Should be Examined Under the Strict Scrutiny Standard

Amicus believes that the same analysis should apply regardless of whether a constitutional challenge to a race-conscious program is brought under the Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee. The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. This is consistent with this Court's earlier cases recognizing that there are no significant distinctions between such limitations on the federal government and limitations on a state and local government.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Board of Education v. Brown*, 347 U.S. 483 (1954), the

Court explained the relationship of the Fifth and Fourteenth Amendments:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499.

The Court then invalidated segregation of public schools in the District of Columbia finding that racial segregation violates the Due Process Clause.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court was confronted with the imposition of residency requirements for welfare eligibility which had been authorized by Congress in Section 402(b) of the Social Security Act. Writing for the majority, Justice Brennan ruled first, that the state residency requirements impinged upon the fundamental right to travel and were not supported by a compelling state interest, second, that "Congress may not authorize the States to violate the Equal Protection Clause," *id.* at 641, and third, that the District of Columbia's residency requirement was a "discrimination . . . so unjustifiable as to be violative of due process." *Id.* at 642 (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)). The equal protection test stated in *Shapiro* required the application of the strict scrutiny standard of review whenever

a classification impinged upon a suspect class or upon a fundamental interest. 394 U.S. at 629.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2.

Again in *Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983), this Court stated: "The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States."

Amicus urges this Court to adopt one standard in examining all race-based preference programs. A strict scrutiny standard of review would be in complete harmony with the goal of a color-blind society free from racial bias.

II

THERE IS NO COMPELLING GOVERNMENTAL INTEREST TO JUSTIFY A RACE-CONSCIOUS CLASSIFICATION

A. The Minority Preference Constitutes a Classification Based on Race

In this case, the court below erred in its examination of the race-based preference policy adopted by FCC in its comparative hearing process. The race-based preference is designed to achieve diversity in broadcast programming by fostering an increase in the number of broadcast facilities owned by minorities. This policy is implemented

through granting of minority preference in comparative licensing proceedings for broadcast stations. 52 Fed. Reg. 596 (1987).

The minority preference at issue here had its origin in *TV 9, Inc. v. Federal Communications Commission*, 495 F.2d 929 (D.C. Cir. 1973), in which the court stated: "We hold . . . that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." The court concluded that it could be assumed that minority ownership would foster diversity of programming. *Id.* at 938.

Subsequently, in *Garrett v. Federal Communications Commission*, 513 F.2d 1056 (D.C. Cir. 1975), the court again addressed minority ownership and stated that the "entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of black citizenry and that 'reasonable expectation' without 'advance demonstration' gives them relevance." 513 F.2d at 1063.

In response to the circuit court's mandates in *TV 9* and *Garrett*, FCC concluded that minority ownership and participation should receive credit in the comparative hearing process as one of several factors. 52 Fed. Reg. at 598. Because of the weight given the minority ownership preference, the court below noted that it can "tip the balance in some cases." *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347, 353 (D.C. Cir. 1989). That is precisely what occurred in the case at bar. On remand, the commission found that Rainbow's minority ownership was the dispositive factor in it being awarded the broadcast license. *Id.* at 351.

Clearly, the race-based preference program in comparative hearings operates against nonminorities and in favor of minorities. It therefore constitutes a classification based on race and "must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491 (opinion of Burger, C. J.).

Yet, the lower court without critically examining the validity of the race-based preference, merely tracks the reasoning and language of an earlier decision, *West Michigan Broadcasting Co. v. Federal Communications Commission*, 735 F.2d 601, 613 (D.C. Cir. 1984). *West Michigan* held that FCC's use of an enhancement factor for minority ownership passed constitutional muster. 873 F.2d at 349. The court relied on only two factors. First, that consideration of minority status was but "one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters," 735 F.2d at 613. Finding support in Justice Powell's approach in *Bakke*, the Court stated that FCC's use of a minority preference furthered the goal of attaining the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (footnote omitted) (quoting 1965 Policy Statement, 1 FCC 2d 393, 394 n.4 (1965)). And second, relying on *Fullilove*, the *West Michigan* court found it unnecessary to undertake a complete review of FCC's preference policy because "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." 735 F.2d at 615; *Winter Park*, 873 F.2d at 355.

As discussed below, for this race-based preference in comparative hearings to be valid, it must satisfy both prongs of the "strict scrutiny" test and this it cannot do.

B. Without Evidence of Past Discrimination There Is No Compelling Governmental Interest to Justify a Race-Conscious Plan

Croson requires that a race-conscious plan contain a factual predicate that identifies past discrimination sufficient to establish a compelling governmental interest. *Id.* at 889. As this Court observed, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 885. Yet this is precisely the kind of "generalized assertions" the court below relies on to validate this race-based preference. *Winter Park*, 873 F.2d at 353.

1. The Congressional Action Relied on Is Wholly Inadequate to Justify a Race-Conscious Plan

FCC has cited congressional statements that minority underrepresentation was the result of past discrimination, 873 F.2d at 353. These statements include a 1982 conference report suggesting that minority underrepresentation in broadcasting is merely part of the larger phenomenon of minority underrepresentation. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982); *West Michigan*, 735 F.2d at 615-16. *See also* 52 Fed. Reg. 597. Additional acts of Congress include the 1988 and 1989 Appropriations Act which contained language directing

FCC to reinstate prior policy with respect to granting minority preferences.

The lower court suggested that these congressional acts are ample grounds for treating FCC's preference policy as if it had been adopted by Congress directly. Thus, relying on the reasoning of *Fullilove*, the lower court did not make a searching inquiry into the purpose of this race-conscious program.

Reliance by the lower court on *Fullilove* is misplaced. In *Fullilove*, a fragmented Court examined the scope of Congress' power to adopt a race-conscious program under Section 5 of the Fourteenth Amendment. The "set-aside," provision of the Public Works Employment Act of 1977 required that 10% of the federal funds granted for local public works projects be allocated to businesses owned and controlled by specified racial and ethnic minorities. Without employing any traditional equal protection review, this Court validated the set-aside as a federal regulation to remedy the effects of past and present racial discrimination and to prevent the recurrence of that discrimination. Chief Justice Burger, writing for the Court, concluded that Congress had constitutional authority under the spending and commerce powers, as well as under Section 5 of the Fourteenth Amendment to enact remedial legislation directed at racial discrimination. He found that over the past two decades Congress' efforts to solve problems associated with discrimination against minority businesses provided an "abundant historical basis" upon which it could have "reasonably determined" that such action was necessary to ensure "equal protection of the laws." In examining whether the use of racial and ethnic criteria in the set-aside was a

valid means to that constitutionally valid objective, he stated that "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria . . . [to remedy] . . . the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Fullilove*, 448 U.S. at 479.

It is clear that the underlying logic in *Fullilove* supports a heightened scrutiny review of all race-based programs. Justice Powell, who joined Chief Justice Burger's opinion, wrote separately. He contended that the set-aside provision had to be judged by "the most stringent level of review" because it employed a racial classification. 448 U.S. at 496 (Powell, J., concurring). He asserted that the challenged provision could be upheld only if it constituted "a necessary means of advancing a compelling governmental interest." *Id.*

It is amicus' position that the *Fullilove* decision is not dispositive in the case at bar. *Fullilove* focused on race-based remedial measures undertaken by Congress after Congress had spent years attempting to address the problems of minority business enterprises. The justices looked to a variety of congressional reports, hearings, and legislation relating to the problems. The race-based preference policy at issue here was the concoction of two judicial decisions. It was a federal agency that adopted the policy without congressional findings of past discrimination. Additionally, what little action Congress took occurred years after the policy had been in place.

It is clear that Congress did not examine whether the use of a race classification was a valid means to increase minority ownership in the broadcast industry. This lack

of examination was recognized in *Steele v. Federal Communications Commission*, 770 F.2d 1192, 1198 (D.C. Cir. 1985), in which the court found that examining FCC's preferential treatment program is not a simple task because "[f]irst, the assumptions and premises themselves have never been critically examined by the courts, Congress, or the Commission. Second, to the extent that they are discernible, they run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy." 770 F.2d at 1198.

In sum, because Congress has never made findings of prior discrimination in the broadcasting industry the congressional action in this case is wholly inadequate to justify the race-based preference policy of FCC.

2. FCC's Race-Based Preference Policy Is the Result of Judicial Decision Making

FCC offers no proof of particular discrimination in the broadcast industry to justify a race-conscious program. FCC's policy was in fact the result of judicial decision making in *TV 9* and *Garrett*. In those cases the circuit court overturned FCC's decision to refuse to award a preference license to minority applicants. In *TV 9* the court stated that minority ownership should be given a preference if black ownership and participation together are likely to bring about programming that is responsive to the needs of black citizenry. *TV 9*, 495 F.2d at 938. In *Garrett*, the court stated that the minority applicant does not have to present evidence that program diversity will be achieved because it can be inferred that

diversity of station ownership will bring about diversity of programming. *Garrett*, 513 F.2d at 1063.

In response to these decisions, FCC developed a policy statement. In the Minority Ownership Report of its Minority Ownership Task Force, FCC stated:

> " 'Despite the fact that minorities constitute approximately 20 percent of the population, they control fewer than *one percent* of the 8500 commercial radio and television stations currently operating in this country.
>
> " 'Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.' " 873 F.2d at 362-63 (opinion of Williams, J., concurring in part and dissenting in part) (emphasis in original) (quoting Federal Communications Commission, Minority Ownership Taskforce Report, Minority Ownership in Broadcasting 1 (May 17, 1978)).

There is plainly no claim of past discrimination. *Winter Park*, 873 F.2d at 353 n.6. Without question then, the minority preference policy fails the *Croson* requirement of specificity. "None of these 'findings,' singly or together, provide the [FCC] with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in [the broadcast industry]." *Croson*, 102 L. Ed. 2d at 886.

Absent a finding of past discrimination, the first prong of the constitutional test for strict scrutiny cannot be satisfied. It is absolutely necessary that FCC proffer something to prove past discrimination. It did not do so and therefore the race-conscious remedy followed by FCC is unconstitutional.

C. Program Diversity Is Not a Compelling Governmental Interest Justifying a Race-Based Preference Program

FCC also attempts to justify its race-conscious program arguing that program diversity is a compelling governmental interest. To justify program diversity as a compelling governmental interest, FCC must show some basis for believing that minority ownership would lead to "minority programming."

While FCC's desire to promote program diversity may be a reasonable policy goal (*see Federal Communications Commission v. National Citizen's Committee for Broadcasting*, 436 U.S. 775 (1978)), it is not sufficient to create a compelling governmental interest justifying a race-based preference program. Both *West Michigan* and *Winter Park* treat FCC's program diversity goal as analogous to Justice Powell's discussion of academic diversity being tied to academic freedom in *Bakke*, 438 U.S. at 313. Yet the diversity interest discussed by Justice Powell in *Bakke* is much different from the program diversity interest advanced by FCC.

In *Bakke*, this Court struck down a university admission policy that set fixed goals for minority admissions. Only Justice Powell reached the constitutional issue and

found that the ability of the university to select a diverse student body under the values of the First Amendment may create a compelling state interest at least in the context of higher education. *Bakke*, 438 U.S. at 311-15 and 323 (Powell, J.). However, the First Amendment does not elevate FCC's program diversity or race-based preference policies to a compelling governmental interest. The plain meaning of the First Amendment requires the federal government to stay neutral, not to promote either diversity or conformity in the area of programming. Furthermore, while "the widest possible dissemination of information from diverse and antagonistic sources" may be a worthy goal of the First Amendment (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)), that goal is to be achieved through a free marketplace of ideas and not through government fiat. *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413 (D.C. Cir. 1983). A goal of diversity of viewpoint does not mean that government is constitutionally obligated to take active steps to promote such opinions. *See Regan v. Taxation with Representation*, 461 U.S. at 546.

FCC has failed to make the necessary findings or any findings whatsoever to justify the use of minority preference to further its goal of attaining diverse broadcast programming. Given todays' regulation of the airwaves, such policy goals cannot satisfy stringent requirements of strict scrutiny.

Moreover, relying on program diversity to justify a race-conscious program increases the risk of racial stereotyping. Because of the holdings in *TV 9* and *Garrett*,

discussed above, FCC has made no attempt to establish a nexus between an owner's race and program diversity. The following language from *Steele v. Federal Communications Commission*, 770 F.2d at 1198, illustrates the preeminent danger in the use of racial classifications in justifying a minority preference program premised on program diversity:

> "The minority preference rests on the assumptions that first, membership in an ethnic minority causes members of that minority to have distinct tastes and perspectives and, second, that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming. . . .There is no reason to assume, for example, that an Italian station owner would primarily program Italian operas or would eschew Wagner in favor of Verdi. Similarly, it is questionable whether a black station owner would program soul rather than classical music or that he would manifest a distinctively 'black' editorial viewpoint. Indeed, to make such an assumption concerning an individual's tastes and viewpoints would seem to us mere indulgence in the most simplistic kind of ethnic stereotyping.
>
> . . . .
>
> "With respect to the second assumption, one would think that station owners--motivated primarily by the desire to turn a profit--would be more influenced in their programming decisions by the tastes, interests, and perspectives of the listening audience than by those tastes and perspectives perhaps attributable to their own ethnic backgrounds." *Id.* at 1198.

FCC has been unable to present any findings on which to base an assumption that a nexus exists between

an owner's race and program diversity. The *West Michigan* holding that FCC may rely on a "[r]easonable expectation" that minority owners are likely to increase diversity of content (*West Michigan*, 735 F.2d at 610) does not create a compelling governmental interest. In *Wygant*, this Court stated: "This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."' " *Wygant*, 476 U.S. at 273 (quoting *Loving v. Virginia*, 338 U.S. 1, 11 (1967)).

Recently, in *Croson*, Justice Stevens reiterated the impermissibility of racial stereotyping. He stated that "the Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause." 102 L. Ed. 2d at 896 (Stevens, J., concurring).

This is exactly what FCC has done by relying on "reasonable expectations" without any supportive findings. "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics." *Croson*, 102 L. Ed. 2d at 893. It is absolutely necessary for FCC to proffer something to justify a compelling governmental interest. It did not do so and therefore the race-conscious remedy is unconstitutional.

III

THE RACE-BASED PREFERENCE POLICY IS NOT NARROWLY TAILORED

Assuming, *arguendo*, that there is a compelling governmental interest to justify the race-conscious

preference, the plan must be narrowly tailored to the remedial purpose. *Croson*, 102 L. Ed. 2d at 890; *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. A racial preference plan must allow for a case-by-case consideration of the applicants to ensure that each minority business has in fact suffered from the effects of past discrimination. *Croson*, 102 L. Ed. 2d at 891; *Fullilove*, 448 U.S. at 486-87. The remedy must be structured in such a way that it minimizes the burden on nonminorities. *Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring).

Additionally, in *Wygant* the plurality opinion noted that the term "narrowly tailored" as used in Supreme Court cases has acquired a secondary meaning; specifically, the term may be used to require consideration of whether lawful alternatives and less restrictive means could have been used. That is, the classification at issue must "fit" with greater precision than any alternative means. *Id.* at 280 n.6. FCC's race-based program does not conform to the strictures of the Constitution because it is not narrowly tailored.

First, the minority preference policy is not narrowly tailored to remedy past discrimination. Congress and FCC did not require the minority preference to be tied to a minority owner who has suffered any disadvantage. Instead, FCC's race-conscious program is based on two court decisions and unverified premises and assumptions that minority ownership will foster program diversity. As this Court found in *Croson*, it is almost impossible to determine whether a program is narrowly tailored when it is not linked to identified discrimination in any way. *Id.* at 890.

Second, Congress and FCC did not consider the use of race-neutral means to increase minority ownership of broadcast stations and to foster program diversity. *See id.* If FCC proceeded on a case-by-case basis to determine the applicant's programming views, there would be no need to employ a race-based preference.

Third, the minority preference policy imposes an unfair burden on innocent third parties. Unlike *Fullilove*, in which this Court found the "actual 'burden' shouldered by nonminority firms is relatively light" (448 U.S. at 484), the substantial preference or enhancement given to minority applicants in a comparative hearing for a broadcast station imposes an insurmountable burden on the nonminority applicant. It deprives him of a unique opportunity to own a broadcasting station, solely because of his race.

In sum, the race-conscious preference policy lacks any of the indicia of narrow tailoring.

CONCLUSION

When the government distributes benefits under a race-conscious program, it rejects the concern for the individual that forms the basis of a free society. Such programs make members of favored classes eligible for preferential treatment regardless of whether they personally have been disadvantaged; while at the same time these programs in their arbitrariness exclude others who may have been subject to equally onerous burdens.

The equal protection guaranty protects all equally. Any race-based program designed by the government must overcome the strict scrutiny standard of review. The only compelling governmental interest sufficient to meet this burden is remedying identified acts of discrimination. Then, a race-based remedy must be narrowly tailored. The remedy must fit the actual wrong and a race-based program must be used only as a last resort. The minority preference applied by FCC in its comparative hearing process is clearly inconsistent with a society dedicated to equal opportunities. Using the strict scrutiny standard provides enhanced protection against the unfocused use of blunt, race-based devices. Amicus, Pacific Legal Foundation, therefore urges that the decision of the Court of Appeal for the District of Columbia Circuit be reversed.

DATED: February, 1990.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION and ANTI DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF METRO BROADCASTING, INC.

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BRIEF AMICI CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION and ANTI DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF METRO BROADCASTING, INC.

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* on behalf of its members and the Anti Defamation League of B'nai B'rith (ADL).[1]

[1] MSLF has obtained the written consent of the Solicitor General of the United States and counsel for Rainbow Broadcasting Company. The letters communicating such written consent have been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

MSLF is a nonprofit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF has an extensive background and expertise in civil rights litigation.[2]

MSLF and its members oppose the use of affirmative action programs by federal, state or local entities when not adopted in direct response to specific acts of discrimination by governmental entities. Affirmative action programs are constitutionally permissible only when they seek to remedy such specific acts of discrimination. Affirmative action programs must be responsive to acts of discrimination by governmental entities and must adhere to easily discernible limiting principles under the Fifth and Fourteenth Amendments.

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[2] MSLF was counsel of record in both *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). In addition, MSLF has participated as counsel or *amicus* in many cases defining the scope and application of the Civil Rights Acts and the Fourteenth Amendment. *E.g., Marsh v. Board of Education*, 581 F. Supp. 614 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985), *vacated and remanded*, 476 U.S. 1137 (1986); *NAACP v. City of Detroit*, 591 F. Supp. 1194 (E.D. Mich. 1984), *reversed and remanded*, 821 F.2d 328 (6th Cir. 1987); *AFSCME v. State of Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987); *City of Richmond v. J.A. Croson Company*, 102 L Ed 2d 854 (1989).

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.[3]

The Anti-Defamation League has long opposed the use of racial preferences in a variety of contexts, taking the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular gender, racial, or ethnic group. As this

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[3] Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Honorable Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hinting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n., Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Most recently, ADL filed an *amicus* brief in this Honorable Court in *City of Richmond v. J.A. Croson Company*, 102 L Ed 2d 854 (1989), arguing the unconstitutionality of that city's racial set-aside program.

Honorable Court has repeatedly held, a government preference that is not narrowly designed to remedy identifiable discrimination is necessarily unlawful. Such a preference is wholly at odds with the basic constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin, and that each person has a right to be judged on the basis of his or her own individual merit – not on the basis of the group to which he or she happens to belong.

The decisions of this Honorable Court in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Company* provide the principles by which the nation must be guided. MSLF and its members and the ADL urge this Honorable Court to reverse the decision of the Court of Appeals for the District of Columbia, and to hold that the *Wygant* and *Croson* "strict scrutiny" standard of review applies to the minority preference policy created by the Federal Communications Commission (FCC).

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici curiae adopt the statement of the case and the statement of the facts as set out in the Petitioner's Brief.

SUMMARY OF ARGUMENT

The use by the FCC of a race-based system in the awarding of television broadcasting licenses compels the

application of the "strict scrutiny" standard of review. Application of that standard of review requires a search for a "compelling governmental interest" in the use by the FCC of a race-based system; yet that search yields no such compelling governmental interest. The absence of any allegation, let alone facts to support an allegation, that the FCC has discriminated against any segment of American society deprives the FCC of a "governmental interest." The only announced goal of the use by the FCC of a race-based system, that is, "program diversity," falls far short of the "compelling" interest required by the "strict scrutiny" test.

Even if there was a "compelling governmental interest" in the use by the FCC of a race-based system – and there is no such interest – that use has failed to comply with the second prong of the "strict scrutiny" test; that is, narrow tailoring. The segment of American society sought to be served by the use of a race-based system has neither been ascertained nor targeted. The FCC has failed to consider race-neutral means to achieve its goal of "program diversity." In place since 1978, the use of this race-based system by the FCC appears both "ageless in [its] reach into the past and timeless in [its] ability to affect the future."[4]

The actions of Congress, in passing annual appropriations for the FCC, are irrelevant to a consideration of the constitutionality of the use by the FCC of a race-based system. Therefore, the decision of this Honorable Court in *Fullilove v. Klutznick* is inapplicable.

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[4] *Wygant*, 476 U.S. at 276.

The use by the FCC of a race-based system has its origins, not in an Act of Congress, but in decisions of the Court of Appeals for the District of Columbia. The adoption by Congress, in 1987, of the Continuing Resolution under which the FCC was funded – and its use of a race-based system perpetuated – is merely an *ex post facto* endorsement of a long-standing, judge-made, FCC policy. Even if the adoption of the Continuing Resolution was a proper reflection of the will of Congress and, for a variety of reasons, it was not – the U.S. Congress, by prohibiting "fact-finding" regarding the use by the FCC of a race-based system, has engaged in actions which, if not *ultra vires*, at the very least deny Congress the deference accorded it in *Fullilove* – where fact-finding preceded the use of a race-based remedy.

Finally, *Fullilove* was a facial challenge in which this Honorable Court addressed, in the abstract, the issue: Could the U.S. Congress, under the spending power of the Welfare Clause, make use of a race-based remedy? The instant case is not a facial challenge, but concerns the actual application of a race-based system adopted, not by the U.S. Congress, but by an independent regulatory agency pursuant to court order. Even *ex post facto* endorsement by the Continuing Resolution of the use by the FCC of a race-based system does not permit application of the rubric of *Fullilove*. Missing in the instant case, but present in *Fullilove*, are Congressional "fact-finding" to ascertain a history of discrimination and the use of a waiver provision that permits case-by-case abandonment of any race-based remedy. In the instant case the use by the FCC of a race-based system was mandated in the

consideration of each and every application, regardless of the facts.

The notion that five individuals – appointed as Commissioners of the FCC – together with their individual and agency staffs, will seek " program diversity" by the use of a race-based system is frightening and Orwellian. It is also unconstitutional. It violates the equal protection component of the due process clause of the Fifth Amendment to the Constitution of the United States of America.

ARGUMENT

I. THE PROPER STANDARD OF REVIEW TO BE APPLIED IN CONSIDERING THE CONSTITUTIONALITY OF A RACE-BASED SYSTEM, WHETHER "REMEDIAL" OR "BENIGN," IS THAT OF "STRICT SCRUTINY," THE APPLICATION OF WHICH RENDERS THE USE BY THE FEDERAL COMMUNICATIONS COMMISSION OF A RACE-BASED SYSTEM A VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

A. The Use Of Race As A Basis For Federal Decision-Making Compels Application Of The "Strict Scrutiny" Standard In Determining The Constitutionality Of Federal Action.

In 1986, this Honorable Court resoundingly stated that the proper, indeed the only, standard of review when considering race-based programs or preferences is "strict

scrutiny."[5] "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[6] In 1989, this Honorable Court invoked the "strict scrutiny" standard and delineated the process by which it is to be applied.[7]

As Justice O'Connor, writing for the majority in *Croson*, noted:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate use of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.
>
> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. (citation omitted) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.") We thus reaffirm the view

[5] *Wygant*, 476 U.S. at 273.

[6] *Id.*

[7] *Croson*, 102 L Ed 2d at 882.

> expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.[8]

Justice O'Connor concluded that the use of a race-based system denies personal rights that are guaranteed to the individual by the Equal Protection Clause:

> The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws" (emphasis added). As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. (citation omitted) The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[9]

The guarantee of our Constitution that these personal, individual rights will not be denied by the use of a race-based system applies to every governmental entity. Otherwise our Constitution is for naught, for the liberties guaranteed therein will soon become victims of "racial politics."

[8] *Croson*, 102 L Ed 2d at 881-82.

[9] *Croson*, 102 L Ed 2d at 881.

This Honorable Court now has the opportunity to demonstrate once more that the teachings of *Wygant* and *Croson* apply to the use of a race-based system by *any* governmental entity, whether Congress, state or local governments, or, as here, an independent regulatory agency.

B. The Federal Communications Commission Has Failed To Demonstrate That Its Use Of A Race-Based System Has Been Undertaken On Behalf Of A "Compelling Governmental Interest."

Wygant and *Croson* require that the use of a race-based system be justified by "a compelling governmental interest."[10] First, the government entity must demonstrate that it has an "interest," which interest may be the result of its own record of racial discrimination. Second, that governmental interest must be "compelling." In the instant case the FCC has failed to comply with either aspect of the "compelling governmental interest" test.

First, the FCC disclosed no history of discrimination by the FCC in the awarding of television broadcasting licenses. The FCC merely decried "the continuing underrepresentation of minorities in broadcast ownership," and set as its goal the achievement of "full minority participation in the ownership and management of broadcast facilities."[11] The FCC asserted that "[u]nless minorities are

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[10] *Wygant*, 476 U.S. at 276, 285. *Croson*, 102 L Ed 2d at 884.

[11] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

encouraged to enter the mainstream of the commercial broadcasting business," the FCC would not achieve its goal.[12] Second, the FCC set forth, as the "interests" which it sought to achieve, in addition to "full minority participation," those of "programming diversity" and "diversification of ownership."[13]

1. The Federal Communications Commission Has Failed To Determine That It Has Engaged In A History Of Discrimination In Which It Has An Interest In Remedying.

The minority preference scheme utilized by the FCC, with no "findings" of discrimination whatsoever, does not fare well when held to the "strict scrutiny" standard of *Wygant* and *Croson*. Such is particularly the case given the call, throughout *Croson*, for "findings," "evidence," "specificity," and "identification."

As Justice O'Connor noted:

> In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief"

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[12] Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting* 1 (1978).

[13] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

> for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. "Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . ." (citation omitted) We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.[14]

The failure of the FCC to search for and find a history of racial discrimination by the FCC in its comparative licensing process compels a finding by this Honorable Court that the FCC has adopted, in a constitutionally deficient manner, a race-based system that must be stricken.

2. The Only Objective Apparently Sought By The Federal Communications Commission, That Is, "Program Diversity," Falls Far Short Of A "Compelling" Governmental Interest.

While the court below found the FCC minority preference policy to be consistent with the holdings of this Honorable Court in, for example, *Bakke* and *Fullilove*, a

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[14] *Croson*, 102 L Ed 2d at 889.

more careful review of the *Bakke* decision reveals just the opposite.[15]

The language of the *Bakke* decision which addressed "academic diversity," is closer to the instant case which concerns "program diversity," than is *Fullilove*, containing as *Bakke* does, a call for "heightened scrutiny" and the need for demonstration of a "compelling governmental purpose."[16] For it was in *Bakke* that this Honorable Court evaluated the goals of "academic diversity" and "the remedying of the effects of 'societal discrimination,' " and found neither to constitute a compelling governmental interest.[17]

Justice Powell's opinion concluded that the desire to have more black medical students or black doctors,

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[15] Judge J. Skelly Wright in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1027 (1985), announcing the opinion of the court, declared that "a number of factors show that the FCC's plan easily passes constitutional muster in light of various *Bakke* and *Fullilove* approaches." *West Michigan*, 735 F.2d at 613. This view was adopted by the majority in the instant case, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

[16] *Croson*, 102 L Ed 2d at 883-84.

[17] *Bakke*, 438 U.S. at 307. Justice O'Connor reached a similar conclusion in *Croson*:

> Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point."

Croson, 102 L Ed 2d at 885.

standing alone, was not sufficiently compelling to justify a racial classification, for it was "discrimination for its own sake," forbidden by the Constitution.[18]

In her opinion in *Croson*, Justice O'Connor discussed the approach of the Court in *Bakke*:

> Nor could the second concern, the history of discrimination in society at large, justify a racial quota in medical school admissions. Justice Powell contrasted the "focused" goal of remedying "wrongs worked by specific instances of racial discrimination" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." (citation omitted) He indicated that for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made. (citation omitted) Only then does the Government have a compelling interest in favoring one race over another. (citation omitted)[19]

The attempt of the FCC to achieve "program diversity" by the use of a minority preference policy fails because that goal falls far short of a "compelling" governmental interest. However, the FCC's minority preference policy is not merely constitutionally deficient, it is frighteningly Orwellian.[20] The specter of a handful of Americans – through the television broadcast licensing process – determining what particular programs are necessary to

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[18] *Bakke*, 438 U.S. at 307.

[19] *Croson*, 102 L Ed 2d at 884.

[20] *Shurberg Broadcasting of Hartford, Inc., v. FCC*, 876 F.2d 901, 920 n.27 (D.C. Cir. 1989).

achieve "diversity" is directly contrary to the goal sought by our Founding Fathers and strikes at the heart of the Constitutional guarantees of due process, of equal protection, and of freedom of speech.

Americans are a diverse people. However, the distinctions between and among us are not primarily racial; instead they are urban and rural, rich and poor, young and old, healthy and infirm. Our interests in radio and television broadcasts do not divide along racial lines, but along the other distinctions between and among American citizens. As Justice Scalia noted in *Croson:* "Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races. . . ."[21]

The goal of program diversity is best achieved by the actions of a freely operating market place. The owners of a television station ignore their market, including that market's minority constituencies, only at the owners' economic peril.

Since the stated goal of the FCC's minority preference policy is not a "compelling" governmental interest, the use by the FCC of a race-based system is constitutionally deficient and must be stricken.

C. The Federal Communications Commission Has Failed To Narrowly Tailor Its Use Of A Race-Based System.

Justice O'Connor faulted the race-based system adopted by the City of Richmond for the city's failure to

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[21] *Croson*, 102 L Ed 2d at 904.

make specific findings of past state-sponsored discrimination: "It is almost impossible to assess whether the . . . [minority preference program] is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."[22]

Justice O'Connor further detailed the need for narrow tailoring in her opinion in *Croson*, quoting *Wygant* with approval:

> Consideration of race-neutral means, an element of narrow tailoring, is revealed through "strict scrutiny" as are surveys of minority experience in the subject industry, so that a governmental entity could demonstrate "a strong basis in evidence for its conclusion that remedial action was necessary." (citation omitted)[23]
>
> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.[24]

Narrow tailoring also compels limits on scope and duration, neither of which are limited in the use by the FCC of a race-based system. The FCC minority preference policy was adopted in 1978. It has continued unabated for

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[22] *Croson*, 102 L Ed 2d at 890.

[23] *Croson*, 102 L Ed 2d at 893.

[24] *Id.*

nearly 12 years. Given recent Congressional action in the appropriations process, it may continue indefinitely into the future. The question is, to what end?

The FCC, in adopting the minority preference policy, indicated that it sought "full minority participation."[25] Does that mean that the FCC's race-based system will continue in place until 20% of the radio and television stations currently operating in the United States are controlled by minorities?[26]

The FCC has selected a remedy that is truly "ageless in [its] reach into the past and timeless in [its] ability to affect the future."[27] Such a remedy runs afoul of the constitutional requirement that any race-based remedy be "narrowly tailored."

The FCC's minority preference policy is constitutionally deficient for its failure to be "narrowly tailored" and as a result must be stricken.

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[25] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

[26] The 20% figure is the FCC's. Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting*, 1 (1978).

[27] *Wygant*, 476 U.S. at 276.

II. THE ADOPTION BY CONGRESS, IN 1987, OF THE CONTINUING RESOLUTION UNDER WHICH THE FEDERAL COMMUNICATIONS COMMISSION WAS FUNDED – AND ITS USE OF A RACE-BASED SYSTEM PERPETUATED – FAILS TO BRING THIS CASE WITHIN THE DEFERENTIAL PURVIEW OF THE HOLDING OF THIS HONORABLE COURT IN *FULLILOVE V. KLUTZNICK*.

A. The Use By The Federal Communications Commission Of A Race-Based System Was Undertaken Due to Decisions Of The Court Of Appeals For The District Of Columbia; The Adoption By Congress Of The Continuing Resolution Was Only An *Ex Post Facto* Endorsement Of A Long-Standing, Judge-Made, Federal Communications Commission Policy.

Until 1978, the FCC's criteria for comparative licensing proceedings were race-neutral. In 1978, as a result of two rulings of the Court of Appeals for the District of Columbia,[28] the FCC instituted the minority preference policy challenged here. In so doing, the FCC expressed the view that, as a result of "[a]cute underrepresentation of minorities among the owners of broadcast properties . . . , a substantial proportion of our citizenry will

[28] *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). The *Garrett* court stated that "[t]he entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." 513 F.2d at 1063 (footnotes omitted).

remain underserved and the larger, non-minority audience will be deprived of the views of minorities."[29] The goal sought by the FCC's race-based policy was "full minority participation in the ownership and management of broadcast facilities . . . to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment."[30]

For nearly a decade, Congress was silent with regard to the manner in which the FCC awarded licenses under its comparative licensing procedure.[31] However, following the 1986 efforts of the FCC to reconsider the factual and legal bases for its minority preference policy, the Congress adopted appropriations language which denied to the FCC any funds for reexamining or abandoning the FCC's minority preference policy.[32]

In light of these facts, it is clear that what is before this Honorable Court is the constitutionality of the use by

[29] Minority Ownership Task Force, FCC, *Report on Minority Ownership in Broadcasting*, 1 (1978).

[30] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978).

[31] In 1982, the Congress, in amending the Communications Act of 1934, directed the FCC to provide a minority preference in the use of a random selection system for the awarding of licenses. The Congress did so as "[o]ne means of remedying the past economic disadvantage to minorities." H.R. Conf. Rep. No. 765, 97th Congr., 2d Sess. 44 (1982). The random selection or lottery system was not used in the instant case.

[32] A Joint Resolution Making Further Continuing Appropriations Act for the Fiscal Year 1988 and for Other Purposes, Pub.L.No. 100-202, 101 Stat. 1329.

the FCC of a court-ordered, race-based system. It is a system which the Court of Appeals imposed upon the FCC in order "to increase diversity of content, especially of opinion and viewpoint."[33] The Court of Appeals did so without any fact-finding whatsoever, without any allegation of, let alone any demonstration of, a history of discrimination by the FCC. The Court of Appeals based its decisions on only a "reasonable expectation" that the amorphous goal of "diversification of content" would be achieved by the use of race as the basis for awarding broadcast licenses.

It is difficult to imagine a more unconstitutional abuse of the power of the judicial branch. While this Honorable Court has exercised great deference in considering the actions of Congress which may impinge upon the Constitution, such deference need not be given to the questionable actions of the federal judiciary.

The actions of the Court of Appeals in commanding use of a race-based system by the FCC must stand on their own and cannot draw support from the *ex post facto* pronouncements of the United States Congress in the adoption of the FCC's annual appropriation. Simply because the Congress subsequently prohibited the FCC from expending funds to ensure that the mandated actions of the Court of Appeals met the commands of the Constitution, does not mean that the original orders of the Court of Appeals were constitutional.

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[33] *TV 9, Inc. v. FCC*, 495 F.2d 929 at 938 (D.C. Cir. 1973).

The race-based system adopted by the FCC in 1978, as a result of the decisions of the Court of Appeals, is unconstitutional and must be so declared.

B. The Problematic Nature Of The "Continuing Resolution" As A Constitutional Act Of Congress, And The Unusual Circumstances Under Which The Continuing Resolution For Fiscal Year 1988 Was Adopted, Not Only Cast Doubt Upon Whether Or Not The Continuing Resolution Reflects The Will Of The Congress, But In So Doing Removes This Case From The Protective Ambit Of *Fullilove v. Klutznick*.

The deference traditionally given by this Honorable Court to Congressional actions which appear to tread upon the liberties guaranteed by the Constitution is not warranted in this case for yet another reason. While the adoption by the Congress of legislation which – in accordance with the rules of the U.S. Senate and U.S. House of Representatives – passes through the committees of jurisdiction and expertise, must be treated with some deference by this Honorable Court, the same cannot be said of the Congress' current approach to appropriating funds for various agencies, such as the FCC.[34]

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[34] A recent publication discussed the disturbing trend in Congressional appropriations:

> At the heart of legislative indifference to the constitutional separation of powers is the continuing resolution. The CR, as it is popularly called, is a disreputable instrument of law which has transmogrified the legislative process into a caricature of what the Constitution intended for the legislative

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Thus while it certainly was proper for this Honorable Court to conclude, as it did in *Fullilove v. Klutznick*, that the adoption of the Public Works Employment Act of 1977 was entitled to the deference of this Honorable

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branch. The CR developed from the concept of "supplemental" appropriations bills. These instruments were used to handle circumstances and needs not contemplated when the regular budget or appropriations bills were passed.

Then came the "emergency supplemental" appropriations bill, which was deemed even more necessary and extraordinary. Sometimes, under the guise of meeting budget constraints, the appropriations committees deliberately created the gridlock that made these supplementals necessary by appropriating insufficient funds to cover entitlements . . . . To these instruments was added the increasingly utilized practice of including authorizing language in appropriations bills, contrary to Senate and House rules.

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The next logical step was the omnibus Continuing Resolution. In this new legislative instrument anything and everything was possible. Careful scrutiny of and deliberation over individual items became impossible. For Fiscal Years 1986, 1987, and 1988, the CR took the place of all 13 regular appropriations bills. As a practical matter, the power of the presidential veto became what our Founding Fathers would have called "nugatory" – of no practical utility. In 1988 it was utterly impossible for any member to have read the bill or even to know what was in all of it.

G. Jones & J. Marini, Eds., *The Imperial Congress: Crisis in the Separation of Powers*, (1988), pp. 135-36.

Court due to the deliberative process that preceded the passage and signing into law of that Act, such deference would be misplaced in the instant case:

> Because Congress adjourned for Christmas immediately upon passage of the CR in 1987, the president was confronted with the choice of shutting down the government until Congress could be reconvened, or approving the bill. He chose to approve the bill. It was weeks before many details of what was in the bill were made available, and much of what was there, all observers agreed, would never have stood the test of the traditional method of authorizations, appropriations, and oversight. Included was the abolishment of executive branch offices that had challenged Congressional policy, all kinds of pork-barrell . . . , plus . . . major substantive laws . . . , and scores of other . . . provisions.[35]

While the question of whether the current appropriations process can withstand constitutional challenge – particularly the use of the Continuing Resolution and the inclusion of legislative language in appropriations acts – must await another case, the procedural deficiencies of that process make one point quite clear, even now: the deference which this Honorable Court gave Congress in *Fullilove v. Klutznick* is not warranted here.

C. The Repudiation By The Congress Of The Efforts Of The Federal Communications Commission To Conduct Fact-Finding To Support Or To Abandon The Use Of A Race-Based System Was, If Not *Ultra Vires*, Then At Least An Action Which Removes This Case From The Protective Ambit Of *Fullilove v. Klutznick*.

In *Fullilove v. Klutznick*, this Honorable Court indicated that one important reason for upholding the

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[35] *Id.*, at 136-37.

constitutionality of the use by Congress of a race-based system was the fact-finding undertaken by the U.S. Congress in the adoption of the Public Works Employment Act of 1977.

However, in the instant case, not only was fact-finding not undertaken by the Congress, but the Congress specifically prohibited the FCC from conducting fact-finding regarding the factual and legal basis for the FCC's minority preference policy. While the U.S. Congress would have been empowered to conduct oversight regarding the propriety and accuracy of the FCC's fact-finding, the authors of the FCC language that was included in the Continuing Resolution apparently did not want to know the facts.

While Congress may be able to act in total disregard of the facts of a particular issue, it cannot so act with regard to Constitutional guarantees. At the very least, the Congressional prohibition against fact-finding regarding the FCC's minority preference policy removes the instant case from the protective, deferential ambit of *Fullilove v. Klutznick*.

D. The Deference Shown Congress By This Honorable Court In *Fullilove* Is Not Merited In This Case Since The Factual Underpinnings Of Fullilove Do Not Exist Here.

1. This Is An "As Applied" (Rather Than A "Facial") Challenge.

The decision of this Honorable Court in upholding the constitutionality of the Public Works Employment Act of 1977 in *Fullilove v. Klutznick*, was in response to a facial challenge regarding the ability of the Congress, following

fact-finding, to adopt a race-based system which sought to remedy a history of nationwide racial discrimination in the construction industry.

Such is simply not the case here. This case does not test the abstract ability of the Congress to engage in fact-finding, and, when supported by such fact-finding, to adopt a race-based system as a remedial measure to a history of state-sponsored discrimination. Instead, what is at issue is the ability of Congress, having rejected fact-finding, to use race as a basis to achieve "program diversity."

2. There Was No Fact-Finding Here To Support The Use Of The Race-Based System Used By The Federal Communications Commission.

Unlike *Fullilove v. Klutznick* where this Honorable Court upheld the race-based remedy adopted by Congress, in the instant case there was no Congressional fact-finding to serve as a basis for the refusal of Congress to permit the FCC to reexamine its race-based system.

Justice O'Connor, writing for the majority in *Croson*, acknowledged the importance of Congressional fact-finding to the *Fullilove* decision, noting that the principal opinion in *Fullilove* "focussed on the evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants."[36]

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[36] *Croson*, 102 L Ed 2d at 458-467.

Without such fact-finding, a critical underpinning of the decision of this Honorable Court in *Fullilove* is missing from the instant case.

3. There Was No Waiver Provision In The Race-Based System Used By The Federal Communications Commission.

A critical element of the decision by this Honorable Court in *Fullilove v. Klutznick* was the presence, in the Public Works Employment Act of 1977, of a waiver provision which permitted a case-by-case application (narrow tailoring) of that statute which, arguably, would permit the statute to survive judicial scrutiny, *as applied*. Justice O'Connor, writing for the majority in *Croson*, recognized the "flexible nature" of the set-aside utilized in *Fullilove* because of the inclusion in the federal statute of a "waiver" provision. According to Justice O'Connor, Chief Justice Burger "indicated that without that fine tuning to remedial purpose, the statute would not have 'passed muster.' "[37]

However, there is no such waiver in the instant case. Instead, under the FCC minority preference policy, a minority preference is to be applied in each and every comparative licensing proceeding. Again, without such a waiver provision, yet another critical underpinning of the decision of this Honorable Court in *Fullilove* is missing from the instant case.

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[37] *Croson*, 102 L Ed 2d at 487.

4. The Actions Challenged Are Those Of An "Independent Regulatory Agency" Rather Than Congress.

The Federal Communications Commission is an independent regulatory agency. In *Humphrey's Executor v. United States*, this Honorable Court characterized the independent regulatory agency at issue therein as having been created by the Congress so as "not to be 'subject to anybody in the government but . . . only to the people of the United States,' free from 'political domination or control,' or the 'probability or possibility of such a thing.' "[38]

As an independent regulatory agency, the FCC must fulfill its duty to the people of the United States to comply fully with the Constitution's guarantee of equal protection of the law.

This Honorable Court, in addressing the constitutionality of the use by the FCC of a race-based system in the awarding of television broadcasting licenses, need not consider the actions of the Congress in denying the FCC the funds necessary to reconsider the factual and legal underpinnings of the FCC's minority preference policy. As noted above, that policy has its origins in the decisions of the Court of Appeals for the District of Columbia. Application of this Honorable Court's "strict scrutiny" standard to the FCC minority preference policy reveals the constitutional deficiencies of the FCC policy. That policy should therefore be stricken.

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[38] 295 U.S. 602, at 625 (1934).

CONCLUSION

It is difficult to envision a more indefensible use of a race-based system than the one at issue. With no fact-finding, with no allegation or proof of a history of discrimination by government agencies, while seeking the most nebulous and undefined of goals ("program diversity"), eschewing race-neutral alternatives and embracing racial stereotypes, the FCC has adopted an "ageless" and "timeless" race-based program. The minority preference policy of the FCC is a brutal assault on the Constitution. It must be so held by this Honorable Court. The decision of the Court of Appeals should be reversed.

Dated this 9th day of February, 1990.

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No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* JEROME THOMAS LAMPRECHT IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

Introduction

The Federal Communications Commission (the "FCC" or the "Commission") extends preferential treatment to female applicants for FM radio stations in comparative evaluation proceedings. In 1983, *amicus curiae* Jerome Thomas Lamprecht applied for and was later denied the opportunity to own an FM radio station pursuant to the Commission's gender preference policy. *In re Application of Jerome Thomas Lamprecht, et al.*, 99 F.C.C.2d 1219, 57 Rad.Reg.2d 1194 (1984). *Amicus* is currently suing the Commission for discriminating against him on the basis of sex in violation of the United States Constitution. *Jerome Thomas Lamprecht v. Federal Communications Commission, et al.*, No. 88-1395 (D.C. Cir. filed June 1, 1988).

The preferential treatment policy employed by the Commission to advance women is a component of its more comprehensive preference policy toward minority applicants. This Court's ruling with respect to the constitutionality of the FCC's minority preference policy in the case *sub judice* will necessarily affect, and may well prove determinative of, *amicus*'s pending challenge to the Commission's female preference scheme. *Amicus* is therefore participating in the instant case in order to preserve his rights below.

Amicus's brief focuses almost exclusively upon the Commission's merit policy as it relates to female ownership and participation in FM radio station comparative hearings. It presents the Court with an additional concrete example of how the Commission's gratuitously decreed preference scheme has worked to rob an otherwise fully qualified individual of the opportunity to operate a radio station. To the extent the Court may be compelled to consider the constitutionality *vel non* of that policy in the instant proceeding, *amicus*'s brief should provide it with useful factual material. *Amicus*'s brief is filed with consent of all parties.

Amicus's Particular Interests

In 1983, *amicus* Lamprecht, Barbara D. Marmet ("Marmet"), and two other applicants, filed mutually exclusive applications seeking authority to operate a new FM broadcast station at Middletown, Maryland, on Channel 276A (103.1 MHz).[1]

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[1] The other applicants were Port Royal Broadcasting and Dragon Communications, Inc. While Port Royal has since withdrawn from the proceedings, Dragon has intervened in *amicus*'s pending litigation against the Commission. Because the Commission viewed *amicus* as Marmet's most serious challenger throughout all stages of the comparative hearing process, a description of Port Royal's and Dragon's qualifications to run the proposed station will be omitted in what follows.

Lamprecht is originally from Maryland. He was born, raised and educated there. He plans to reside in Middletown as the proposed station's full-time general manager if awarded the radio license he seeks. He holds a B.S. degree in radio, television, and film from the University of Maryland and has more than fifteen years of broadcast experience in a variety of management and non-management positions at radio stations. Lamprecht's ownership interest in other broadcast media under existing Commission standards is *de minimis*; greater media diversification of ownership would result from awarding the license to him.

Marmet is from Omaha, Nebraska. She is a graduate of Bradford College and the University of Michigan where she received a B.A. in Liberal Arts, majoring in Sociology. She has business experience acquired through several different projects including working as a representative for a college admissions office, serving on the Board of Directors and as Treasurer of Planned Parenthood of Metropolitan Washington, working as a part-time bookkeeper and engaging in real estate management. She plans to operate the new stations as its full-time general manager. She has no broadcast experience. She has resided within the proposed station area since 1979 and has engaged in some civic activities since that time.

In 1984, an Administrative Law Judge ("ALJ") conducted hearings to determine which applicant would best serve the public interest. *In re Application of Jerome Thomas Lamprecht, et al.*, FCC 84D-42 (released June 14, 1984). Each applicant was ranked according to the five comparative criteria presently employed by the Commission to resolve competing claims to a broadcast license: (1) quantitative integration[2]; (2) qualitative integra-

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[2] "Quantitative integration" refers to the degree to which each applicant will integrate corporate ownership into the day-to-day management of the station.

tion[3]; (3) auxiliary power[4]; (4) comparative coverage[5]; and (5) minority or female enhancement.[6]

The ALJ found Lamprecht's and Marmet's quantitative integration factors to be off-setting. Despite Marmet's lack of broadcast experience, the ALJ awarded her a "slight preference" over Lamprecht in terms of qualitative integration.[7] Because Marmet proposed auxiliary power, whereas Lamprecht did not, she was also given a slight additional comparative preference. Finally, the ALJ granted Marmet a "substantial preference" over Lamprecht in consideration of the Commission's female enhancement policy. The ALJ summed up the matter bluntly:

> On this criterion, Lamprecht suffers from a birth defect: he was born a white, Anglo-Saxon, male. They are not in demand under the Commission's present deregulatory, comparative scheme. . . . There was a day, in the dim and distant past, when Lamprecht might well have prevailed in this comparative contest. His educational background is broadcast-oriented. He has both management and non-management experience. He is a young man who appears aggressive enough to make a substantial contribution to his chosen career. In short, he's ready for an ownership role. But, in this day and age, it is doubtful that he could win any comparative proceeding.

In re Application of Jerome Thomas Lamprecht, FCC 84D-42 (released June 14, 1984) at 11.

The ALJ thereupon granted Marmet's application for the license. There can be little doubt but that her qualitative enhancement as ar integrated female owner with local residence overcame Lamprecht's enhancement for substantial past broadcast experience and was responsible for her being awarded the license.

The Review Board affirmed the ALJ's ruling. It awarded Marmet very slight preferences for service area residence and civic participation and a more substantial preference for female integration as a general manager. The Review Board termed the ALJ's remarks concerning the comparative disadvantages of being a white male "hyperbole" and dismissed Lamprecht's equal protection challenge to the female preference awarded Marmet, stating "Femaleness is recognized by the Commission as a proper comparative enhancement factor [citation omitted], and it has been given no more and no less than its due here." *In re Application of Jerome Thomas Lamprecht*, 57 Rad.Reg.2d 1194, 1200 (1984). The Commission affirmed the Review Board's decision without opinion. Lamprecht's appeal to the D.C. Circuit followed shortly thereafter.

The Commission's Female Preference Policy

The Communications Act of 1934 authorizes the FCC to regulate communication by wire and radio, prescribe

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[3] "Qualitative integration" refers to the attributes each applicant will bring to the station's daily management, *i.e.*, past broadcast experience, past broadcast education and general business experience.

[4] The Commission inquiry here focuses on the extent to which an applicant has indicated that it will provide an auxiliary power supply to assure continuous operation in the event of a power failure.

[5] The "comparative coverage" factor concerns whether an applicant deserves a preference because of a superior area and/or population proposal. It was not an issue at this hearing and will not be discussed below.

[6] The Commission awards a preference to minority and female applicants on the basis of its own speculation and conjecture that increased minority and female ownership of broadcasting facilities will promote the public interest in fostering diversity of viewpoint in the mass media. As noted below at 14-17, there is no evidence to support the Commission's assertions in this regard.

[7] According to the ALJ, Marmet's past education, her overall business experience, her local residency, and her civic involvement permitted the conclusion that she could adequately manage the station.

the qualifications of radio station operators, and issue broadcasting licenses "as public convenience, interest, or necessity requires." 47 U.S.C. Sec. 303 (1982). In reterpreting the Act's public interest standard, the Commission has held that "a maximum diffusion of control of the media of mass communication, generally referred to as diversification" is a primary goal. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Commission applies the diversity rationale in the comparative licensing process when it considers "the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).

The Communications Act does not mention a minority preference policy, to say nothing of a gender preference policy, and the Commission originally interpreted it to be in accordance with the principle of non-discrimination: an applicant's race or gender was not considered or deemed relevant in comparative license hearings.

The Commission's original policy and practice of nondiscrimination came under attack in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), following the Commission's refusal to award comparative merit to a corporate applicant that claimed the merit because it had two black shareholders. In *TV 9*, the D.C. Circuit rejected the Commission's practice of adhering to non-discrimination in interpreting the Act's public interest standard. It held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." *Id.* at 938. The court explicitly refused to require that the award of merit be linked to a prior empirical finding by the Commission that minority involvement would produce superior program service. *Id.* at 941. In refusing to require tangible proof that minority participation in station ownership would increase

diversity of programming content, the court held that a preference should automatically be granted to a minority applicant if there was a "[r]easonable expectation" that such participation would produce a public interest benefit. *Id.* at 938.[8]

In accordance with the court's order, the Commission began recognizing minority ownership and participation as affirmative factors that enhanced an applicant's proposal in the comparative evaluation process. Soon, the Commission began actively promoting a series of administrative devices designed to increase minority ownership opportunities.[9]

In *Mid-Florida Television Corp.*, 70 F.C.C. 2d 281 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981) an applicant in an FM radio license proceeding asked the Commission to grant it enhanced merit because of the presence of a woman owner.[10] The Com-

[8] The D.C. Circuit has reaffirmed and expanded the *TV 9* decision in subsequent cases. See, *e.g.*, *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (reaffirming that minority ownership and participation are likely to bring about programming responsive to minority needs); and *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (approving award of minority merit preference not only to ensure programming responsive to minority needs but as a means to expose nonminority listeners to minority viewpoints).

[9] One such device, the Commission's policy of offering special "distress sale" relief enabling licensees designated for a hearing on character qualifications issues to apply for assignment of their licenses to minority purchasers is under review by this Court in the companion case, *Astroline Communications Co. v. Shurberg Broadcasting of Hartford*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990).

[10] Twelve days prior to the release of its decision in *Mid-Florida*, the Commission issued a Review Board Decision in which it granted "credit" to an applicant because a woman had a one-third ownership interest. *Gainesville Media Inc.*, 70 F.C.C.2d 143 (1978). No rationale was given for granting the credit and more than one commentator has remarked that the grant could arguably be viewed as being *dictum* as it was not outcome determinative. See, *e.g.*, Com-

munications Act does not mention a female preference policy and in contrast to the prevailing minority preference scheme, the Commission was not then under a court order to implement a female preference policy. It nevertheless decided *sua sponte* to award merit for female ownership and participation to the applicant relying upon the diversification rationale underlying the *TV 9* decision:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation. . . . The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership can be of value.

70 F.C.C.2d at 326.

The Commission failed to offer any evidence other than its own assertions of statistical underrepresentation, either at the time of its ruling in *Mid-Florida* or since, to support its declaration that women have been discriminated against in broadcasting or that an increase in female ownership would necessarily increase diversity of programming. Conceding that "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks," *id.* at 326, the Commission decided not to accord female ownership and participation the same weight as that accorded minority ownership and participation.[11] After the *Mid-Florida* decision, female preferences became an integral part of the Commission's comparative broadcast proceedings with the result that individuals such as *amicus* have been denied broadcasting industry opportunities because of their sex.

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ment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 Nw. U.L. Rev. 665, 679 (1989).

[11] However, as in the case of *amicus* Lamprecht, the female preference may still be outcome determinative.

SUMMARY OF THE ARGUMENT

The Commission's Review Board used the race and gender preferences to award Rainbow a license over Metro. By denying Metro's petition for review, the full Commission adopted the Review Board's reasoning, including the Review Board's reliance on the gender preference, notwithstanding the Commission's discounting the gender preference's significance in the Review Board proceeding. Subsequently, the full Commission acknowledged the gender preference's role in the denial of Metro's license application when the Commission undertook its Congressionally aborted reappraisal of the race and gender preferences. As the gender preference was, in the Commission's own words, of "decisional significance" in the denial of Metro's license application, and as the constitutionality of the gender preference was raised before the Court of Appeals below and in the petition for certiorari granted by this Court, this Court should address that question.

The gender preference is subject to this Court's intermediate standard of equal protection review. As such, the burden is on the Commission to establish that the preference is substantially related to its proffered objective of *programming* diversity. The Commission has failed to carry this burden, and has relied upon speculation and conjecture to support its assertions that the female preference expands programming diversity. The gender preference is manifestly unreasonable as a means of achieving programming diversity, and as such this Court should hold it a violation of the principle of equal protection.

ARGUMENT

I. THE COURT SHOULD REACH THE ISSUE OF THE CONSTITUTIONALITY OF THE FEMALE PREFERENCE

In the Review Board proceeding in which Rainbow was awarded a license over Metro, the Board determined that "Rainbow's substantial minority preference, *in conjunction with its slight female ownership advantage* and solid broadcast experience preference, somewhat outweighs Metro's local residence and civil participation advantage. • • • Therefore, based on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro." Cert. Pet. App. 88a (emphasis added). The Board then concluded that Rainbow's "slight integration preference" based upon the gender and race preferences was sufficient to "carry the day," and ordered that Rainbow be awarded the license application over Metro. Cert. Pet. App. 90a. Hence, by the very terms of the Review Board decision, a gender-based criterion was a substantial factor, possibly outcome determinative, in Metro's license denial.

The full Commission denied Metro's petition for review of the license denial. Cert. Pet. App. 62a. In so doing, however, the Commission gratuitously opined that "on the facts before us, even if . . . no consideration were given to Rainbow's 5% female participation, it would not change the outcome of this case." Cert. Pet. App. 61a. Notwithstanding those comments, however, the Commission's *denial* of Metro's petition for review had the effect, under 47 U.S.C. Sec. 155(c)(3), of *adopting* the Review Board's decision and reasoning.[12] The Commission's after-the-fact attempt to downplay the significance of the female preference in Metro's license denial is not entitled to any weight.

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[12] Section 155(c)(3) provides that "any [Review Board] order, decision, report, or action . . . unless reviewed as provided . . . shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

When the Commission undertook to review its racial and gender preferences, the Court of Appeals remanded Metro's appeal of its license denial to the Commission. Cert. Pet. App. 58a. On remand, the Commission conceded that "absent credit for its minority *and* female integration, Rainbow *would* lose its qualitative advantage over Metro," and that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro." Cert. Pet. App. 56a-57a (emphasis added). In other words, as the Commission put it, "Rainbow's minority *and* female preferences appear to be decisionally significant." *Id.* (emphasis added). These statements by the Commission were a belated recognition that in denying Metro's petition for review, it had adopted in full the reasoning of the Review Board.

The Commission's award of the license to Rainbow over Metro was in fact based upon both race and gender. The question of the constitutionality of the gender preference was raised below in the Court of Appeals,[13] and is raised in the first question presented for review in the petition for certiorari filed by Metro and granted by this Court. Thus, this Court should address the question even though it was not passed upon by the Court of Appeals. See, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S.

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[13] Citing the Commission's *dicta* in its order denying review that the gender preference was not outcome determinative, the Court of Appeals declined to address the constitutionality of the preference. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352-353 n.5 (1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990) ("*Winter Park*") [Cert. Pet. App. 10a n.5]. As noted above, the Commission's comments in this regard are not entitled to any weight, and in any event are contradicted by the Commission's subsequent statement upon remand from the Court of Appeals that the "minority *and* female" preferences were "decisionally significant" in the denial of the license to Metro. (Emphasis added.)

691, 697-698 (1984) (rule precluding review of questions not passed upon by the lower court "is not inflexible," particularly in cases coming from federal courts; the Supreme Court addressed question raised in complaint, that was acknowledged, though not passed upon, by both the District Court and the Court of Appeals, and that the parties briefed and argued pursuant to the order granting certiorari); see also *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n. 24 (1979) (failure of the Court of Appeals to address statutory issue decided by the District Court did not prevent the Supreme Court from reaching the issue; it was appropriate to reach the issue because it was fully aired before the District Court, it involved the application of settled legal principles to uncontroversial facts, and it had been carefully briefed in the Supreme Court).

II. THE FCC HAS NOT CARRIED ITS BURDEN OF ESTABLISHING THAT THE FEMALE PREFERENCE IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF PROGRAMMING "DIVERSITY"

This Court has held that the party seeking to uphold a statute that classifies individuals on the basis of gender "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The burden is satisfied only by showing that "the classification serves 'important government objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* That the classification at issue discriminates against males rather than females does not exempt it from scrutiny or reduce the standard of review. *Id.* at 723-24.

In this instance, the sole justification that the Commission proffers for its female preference policy is that female broadcast license ownership allegedly contributes to the diversity of broadcast *programming*. *Winter Park*,

supra, 873 F.2d at 356 (Williams, J., concurring in part and dissenting in part) [Cert. Pet. App. 18a].[14] The Court need not reach the question of whether "diversity" in programming is an "important government objective." Even assuming, *arguendo*, that it is, the means employed by the Commission do not satisfy even a rational-basis standard of review, much less the more-exacting substantial relationship test that this Court employs in gender-classification cases.

In assessing whether a governmental entity's gender classification is "substantially related to" the proffered government objective, a reviewing court must determine

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[14] Even if the Commission were to have claimed a remedial purpose in instituting and defending its female preference policy, the justification would fail for the same reasons that its "diversity" justification fails: the Commission has failed to carry its burden of establishing that the discriminatory means employed are substantially related to that purpose. See, *e.g.*, *Johnson v. Transportation Agency*, —— U.S. ——, ——, 107 S.Ct. 1441, 1461-1462 (1987) (O'Connor, J., concurring in judgment) (the coterminous limitations of Title VII and the Equal Protection Clause require that public entities instituting race- or gender-conscious affirmative action plans must "point to evidence sufficient to establish a firm basis for believing that remedial action is required"); *City of Richmond v. J.A. Croson Co.*, —— U.S. ——, ——, 109 S. Ct. 706, 724 (1989) (assertions of "remedial" purposes are entitled to "little or no weight" in the absence of particularized findings of prior discrimination by the governmental entity or in the industry in question).

Moreover, whatever relevance that *Fullilove v. Klutznick*, 448 U.S. 448 (1980), still has as to *Congress's* authority under Section Five of the Fourteenth Amendment to remedy societal discrimination, see, *e.g.*, *Croson*, —— U.S. at ——, 109 S. Ct. at 740 (Marshall, J., dissenting) (*Croson* represents a "deliberate and giant step" away from *Fullilove*), Congress in its appropriations acts for fiscal years 1988 and 1989 did not enact the female preference into law to remedy any Congressional findings of societal discrimination against women. *Winter Park*, *supra*, 873 F.2d at 363-365 (Williams, J., concurring in part and dissenting in part) [Cert. Pet. App. 34a-35a]. Rather, Congress merely ordered the reinstatement of previous FCC preferences, which Judge Williams aptly characterized as ordering "a kind of mental stand still." *Id.*

whether the classification is based upon "overbroad generalizations" which are entirely unrelated to any differences between men and women." *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). Accordingly, whether the governmental entity responsible for the classification "extensively considered" whether males and females differ in the way that the classification presupposes is an important consideration. *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981). To put the matter another way, whether the government undertook to create a substantial factual record establishing that men and women do differ as is claimed is highly relevant. See, *e.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down a statute that permitted the adoption of children without the consent of unwed fathers but not without the consent of unwed mothers; the State's arguments that unwed mothers were more likely to be living with children, and that the whereabouts of unwed fathers were often unknown, were overbroad and inaccurate generalizations about males); see also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151-152 (1980); *Michael M. v. Superior Court*, 450 U.S. 464, 501 (1981) (Stevens, J., dissenting).

In this instance, the FCC has never offered "any reason, policy, fact, finding or citation to explain or support the sudden and gratuitous announcement of its [gender-based] preferential policy," *Steele v. FCC*, 770 F.2d 1192, 1197 (D.C. Cir. 1985), *reh'g granted and opinion vacated* (Oct. 31, 1985) save for its generalized assertions that

> [w]omen are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value.

Mid-Florida Television Corp., 70 F.C.C.2d 281, 326 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203

(1981). Needless to say, this rationale suggests a *remedial* purpose rather than an effort to foster "diversity" in programming.[15] To the extent that the *Mid-Florida* statement is a rationale for diversity, it doesn't even begin to answer the question of how "diversity" in the sexes of owners and operators of broadcast facilities results in more diverse *programming*.

To the extent that the Commission's feeble *Mid-Florida* explanation for the preference policy is an assertion that men and women as groups have distinctive interests or views, this Court has previously dismissed such undocumented assertions:

> In claiming that women might have a different attitude * * * or that the organization's public positions would have a different effect if the groups were not "a purely young men's association," the Jaycees rely solely on *unsupported generalizations about the relative interests and perspectives of men and women.* * * * Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decision-making that relies uncritically on such assumptions.

Robert v. United States Jaycees, 468 U.S. 609, 627-628 (1984) (emphasis added) (rejecting First Amendment challenge to state non-discrimination law).

The Commission's generalizations are probably even less defensible than these, since the Jaycees may have been able to cite statistical evidence that males and females tended to differ in controversies of interest to that group. The only basis for the Commission's assumptions is a conclusory statement by the Review Board in the *Mid-Florida* case. The claim that women licensees would broadcast more programs of interest to women than male broadcasters would, or would otherwise enhance the

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[15] But as noted above, the FCC has expressly renounced any remedial purpose in defending the preference.

"diversity" of programming, even if they were competing for the same markets, has never received empirical validation. Neither has the claim that women, as a class, enjoy different types of programming from those preferred by men.

Better-founded generalizations than the Commission's have often failed to survive review. The cases "have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on * * * predictive empirical relationships." *Craig v. Boren*, 429 U.S. 190, 202 (1976); see also *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707-708 (1978) (although a pension fund policy was based on the true generalization that women live longer than men, still "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983); *Hogan, supra*, 458 U.S. at 726 n.12. But the Commission "has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. "Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded." *Steele, supra*, 770 F.2d at 1199.

Beyond the failure of the Commission to offer any empirical evidence to support its assertions that sexual diversity in broadcast ownership and management somehow enhances diversity in programming, the *Steele* court demonstrated that such assertions are manifestly unreasonable:

> Whatever the merit of these assumptions [that members of ethnic minority groups have distinct tastes and perspectives, and that these differences will be reflected in distinctive editorial and entertainment programing] as applied to cohesive ethnic cultures, it simply is not reasonable to expect that granting preferences to women will increase programing diversity. Women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs, for example, women in fact appear to be just as divided among themselves as are men. Therefore it is not reasonable to expect that a woman would manifest a distinctly "female" editorial viewpoint.

Steele, 770 F.2d at 1199. Thus, even under a rationale basis standard of view, the Commission's female preference would not pass constitutional muster.

In sum, the Commission relied upon its own speculation and conjecture to establish a gender-based classification, a practice of governmental entities that this Court has repeatedly rejected, and should do so again in this case.

CONCLUSION

The Court is properly presented with the constitutionality of the Commission' gender preference in comparative license proceedings. The Court should address that question, and hold that the Commission's failure to demonstrate that its gender preference is substantially related to the Commission's proffered goal of programming diversity renders the preference unconstitutional.

Respectfully submitted,

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No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF GALAXY COMMUNICATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF GALAXY COMMUNICATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Galaxy Communications, Inc. is an applicant before the Federal Communications Commission for a construction permit for a new FM radio broadcast station in Selbyville, Delaware. Its application was recently denied by an FCC Administrative Law Judge in deference to an applicant whose principals are minorities. *Anchor Broadcasting Limited Partnership*, 4 FCC Rcd 5687 (1989). On three of the four comparative factors at play in the case, Galaxy surpassed the winning applicant. But for the minority composition of the competitor, Galaxy would have prevailed. Galaxy has appealed the denial of its

application to the FCC's Review Board. Accordingly, Galaxy has a significant interest in the outcome of this Court's review of the FCC's minority preference policy.[1]

Galaxy will confine its discussion herein to the FCC's preference policy only as it relates to an applicant's race or ethnicity in the context of the Commission's comparative licensing procedures. We do not address the constitutionality of the female preference policy which, in our view, turns on related but separate issues.

SUMMARY OF ARGUMENT

The history and framework of the FCC's comparative licensing scheme is outlined in detail in Petitioner's brief. Our references herein to the Commission's licensing procedures should be read in the context of that discussion.

Galaxy will focus on one aspect of the FCC's rationale for treating minority and ethnic applicants preferentially, *i.e.*, the "program diversity" theory. The rationale for awarding minority preferences to achieve program diversity in the broadcasting industry will not withstand strict scrutiny. In the very limited setting of an educational institution, "diversity" may serve a defensible government interest. However, crucial dissimilarities between diversity in academia and in broadcast programming undermine the argument that First Amendment considerations, in and of themselves, elevate diversity in programming to the status of a compelling government interest. Moreover, other means are available to foster diverse programming views. Finally, in any event, the minority preference policy is not narrowly tailored to achieve its asserted objective.

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[1] Pursuant to Rule 36.2 of the United States Supreme Court, this brief is filed with the consent of Petitioner and Respondents. Copies of the letters of consent are being filed herewith.

ARGUMENT

THE FCC'S MINORITY PREFERENCE POLICY VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION

Classifications which are based on racial or ethnic distinctions are inherently suspect. *Korematsu v. United States*, 323 U.S. 214 (1944). The Supreme Court has "consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

A broadcast license, a job, a seat in a medical school class, or other benefits in short supply given to some on the basis of their race must be taken from others on the basis of their race. No racial distributions, whatever their alleged objective, can be "benign." *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. 706, 721 (1989). Therefore, any use of racial classifications must be subject to strict scrutiny and cannot be ". . . dependent on the race of those burdened or benefited by a particular classification." *Croson*, 109 S.Ct. at 721, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-80 (1986).

The purpose of strict scrutiny is to discern illegitimate uses of race by ensuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *See Croson*, 109 S.Ct. at 721. As Justice O'Connor has recognized, the test "ensures that the means chosen 'fit' [a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

Therefore, it is not sufficient justification for the use of racial categories that they are possible devices to

achieve worthwhile ends or that there is some rational basis for their use. Rather, for a racial classification to withstand strict scrutiny, two exacting conditions must be satisfied. First, the means chosen must be necessary to achieve a compelling government interest. *Wygant*, 476 U.S. at 274; *Croson*, 109 S.Ct. at 721. Second, the racial classification must be narrowly tailored to achieve the compelling interest. *Id.* As demonstrated below, the FCC's minority preference policy satisfies neither of these conditions.

I. THE FCC'S MINORITY PREFERENCE POLICY IS NOT NECESSARY TO ACHIEVE A COMPELLING GOVERNMENT INTEREST

As outlined in detail in Petitioner's brief, the FCC's minority preference policy had its origin in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and in *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). In *TV 9*, the District of Columbia Circuit held that merit should be awarded in licensing contests "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, ..." *TV 9*, 495 F.2d at 938. Subsequently in *Garrett*, the same circuit determined that "Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of Black citizenry. . . ." *Garrett*, 513 F.2d 1062. The *Garrett* court rejected the FCC's view that a credit for racial preference should be awarded only where an applicant demonstrates a nexus between race and increased program diversity. Instead, the court created an *a priori* and irrebuttable presumption that minority ownership and management will promote program diversity. *Id.* at 1063. Pursuant to these rulings, the FCC incorporated minority and ethnic preferences into its comparative licensing scheme. *See generally WPIX, Inc.*, 68 FCC 2d 381 (1978); *and Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985). Today, the presumption that minority ownership will result in program diversity constitutes the theoretical core of the FCC's minority preference policy. Evocative as the diversity goal may be, however, it cannot justify the use of racial and ethnic criteria in the selection of broadcast licensees.

A. Program Diversity Is Not A Compelling Government Interest

In upholding the FCC's minority preference policy, the District of Columbia Circuit ruled in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), that the issue of the policy's constitutionality is controlled by the same circuit's previous decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The court in *West Michigan* held that the FCC's minority preference policy, as an instrument for program diversity, served a legitimate government interest and was therefore constitutional. *Id.* at 613. The court reached this decision by analogizing the FCC's goal of diversity in broadcasting to the goal of academic diversity, validated as a compelling government interest in *University of California Regents v. Bakke*, 438 U.S. 265 (1978). As will be demonstrated below, the analogical argument is strained, not because there is no analogy between the two cases, but because the differences are more significant than the similarities. While achieving diversity in an educational setting may be sufficiently compelling, the FCC's goal of diversity in programming through the use of race-specific criteria is not.

In *Bakke*, Justice Powell approved of an educational institution's use of race as one factor among many to attain the laudable goal of a diverse student body. The First Amendment provides the constitutional predicate. In this way, students are exposed to the "atmosphere of 'speculation, experiment and creation'—so essential to the

quality of higher education—[that] is widely believed to be promised by a diverse student body." *Id.* at 312.

In *Bakke*, race was found to be acceptable for consideration by admissions officers in universities, but only as one consideration in that process, and only when the factor of diversity made a telling difference. *Id.* at 314. Indeed, for four of the Justices in that case, the constitutional issue was not even properly reached, the matter being plainly determinable on the basis of Title VI which, in the plainest language, categorically forbids favor on the basis of race. *Id.* at 281-82; Civil Rights Act of 1964, as amended, § 2000d.

In *Bakke*, Justice Powell flatly and forcefully rejected the use of race for the purposes of achieving proportionality. *Id.* at 304. "Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 309. It was only because of the unique place of the university, engaged so centrally in the "robust exchange of ideas," that First Amendment considerations became relevant. *Id.* at 312. That unique role of the university alone motivated Justice Powell to regard diversity as a sufficiently compelling government interest. *Id.* at 312-15.

The court in *West Michigan* seized upon Justice Powell's acceptance of diversity as a compelling government interest and inappropriately applied it to the broadcast context. *West Michigan*, 735 F.2d at 614. Academic diversity was likened to the FCC's "goal of attaining diverse programming on the First Amendment value 'that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Id.* at 614, *citing Associated Press v. United States*, 326 U.S. 1, 20 (1945).

This line of reasoning fails because there are fundamental differences between the academic and broadcast

settings. First, under Justice Powell's rationale, it is not diversity in itself that justifies the use of race in giving a preference; it is diversity in the discussion of ideas in the context of a university education. Further, diversity is significant only when, absent a minority preference, there would not be a sufficient number of minorities present to bring to their classmates the variety of points of view that their education requires. *Bakke*, 438 U.S. at 312.

The crucial fact in the academic diversity rationale is that non-minority students, interacting and freely exchanging ideas with minority students, will associate diverse opinions with their advocates—the minority speakers. In this way, racial stereotypes are broken down. Thus, the racial or ethnic diversity of those present has, in some contexts, a teaching function.

Diversity in broadcast programming is wholly distinguishable. A radio or television station audience cannot "see," as the students can, the proponents of the ideas which the station disseminates. Diverse views expressed in editorials and in the presentation of news almost never reflect the race or ethnicity of the licensee. A minority-owned station's news, editorials and public affairs programming cannot be said to break down racial prejudices in the sense envisaged by Justice Powell in *Bakke*. Nor can there be a credible argument that, absent the minority preference, the public will be done a constitutional injury under the First Amendment.

Moreover, if Justice Powell's rationale in *Bakke* is to be transferred to the broadcast setting, it will be necessary to reconsider what he meant when he said that minority status (to be appropriately considered) would have to be one of a number of factors weighed. *Bakke*, 438 U.S. at 314. His point was that the university's goal must honestly be that of achieving diversity of opinion and ideas and not that of merely increasing the number of minorities. *Id.* at 314. Justice Powell reasoned

that good faith in pursuing this objective would be found only if the university also sought persons of different economic status, different geographical backgrounds, different ages, etc. *Id.* at 315. These additional factors go to the question of diversity.

The FCC's minority preference policy, however, does not operate this way. The only factors considered in determining an applicant's diversity are race, ethnicity or gender. The other factors for which qualitative enhancements are given—local residence, civic involvement, past broadcast experience—go not to the applicant's diversity but to his or her ability to operate a broadcast facility in the public interest. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), *recon. denied*, 1 FCC 2d 918.

Indeed, the FCC's attention to these other enhancement factors strongly suggests that, except for minority status, ethnicity or gender, no other "diversity" factors are weighed, and even non-diversity factors are weighed positively in the comparative balance. This is starkly different from the university context. If, in the university, admissions officers considered only performance, character, exam results—*and race*—race would plainly not be one among a variety of "diversity" factors. Yet, that is precisely the infrastructure of the FCC's minority preference policy. Because various enhancement factors are used in the comparative contest, they are erringly perceived as different diversity factors. In short, the word "diversity" is unwittingly used duplicitously in the two contexts.

B. The FCC's Minority Preference Policy Is Not A Necessary Means Of Achieving The Goal Of Program Diversity Because Other Race-Neutral Alternatives Exist

A majority of the Court in *Croson* forcefully reiterated that race-specific criteria have little chance of surviving

constitutional scrutiny where valid race-neutral alternatives exist for achieving the same goals. *Croson*, 109 S.Ct. at 728. Justice O'Connor was critical of the drafters of the minority business set-aside plan at issue in *Croson* for not considering the "use of race-neutral means to increase minority business participation in city contracting." *Id.* She noted that the principal opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), determined that Congress had carefully examined and rejected race-neutral alternatives before enacting the minority business set-aside program. *Croson*, 109 S.Ct. at 728.

In the broadcasting industry, program diversity is assured through many factors other than minority ownership preferences. As a practical matter, the most potent factors affecting program content are market forces—the commercial pressures that competition imposes upon station licensees. It is one of the theoretical underpinnings of the FCC's deregulatory philosophy that the "invisible hand" of the marketplace will ensure the variety of viewpoints which is the asserted goal of the minority preference policy.

If market forces were not sufficient by themselves, however, there are other means by which the FCC engenders program diversity without involving race or ethnicity. These approaches focus instead on the responsibility of licensees as stewards of a public trust to air programming that is diverse and responsive to the citizenry.

For instance, for many years the FCC required new broadcast station and license renewal applicants to conduct extensive ascertainment studies. *See, e.g., Amendment to the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees*, FCC 80-134 (released April 4, 1980). These surveys were intended to give existing or aspiring licensees an understanding of the needs and in-

terests of a variety of significant groups within the licensee's community, including minority and ethnic groups. *Id.* at 2. A station's programming was expected to reflect a sensitivity to the diverse concerns of such groups. *See, e.g., Mississippi Authority for Educational Television*, 79 FCC 2d 577 (1980).

The formal ascertainment requirement was repealed in the wake of the deregulation movement of the early 1980s. However, the underlying policy remains in effect in the FCC's regulations. Licensees are still required to maintain a list, updated quarterly, of the most significant needs and interests found in the community, together with a list of the programs they broadcast to address those concerns. *See* 47 C.F.R. § 3526(a)(8) (1988); *see also Third Further Notice of Inquiry and Notice of Proposed Rule Making*, FCC 89-109 (released August 16, 1989) ("The 'issues/programs' list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community.").

Likewise, in the context of comparative licensing proceedings, a means to achieve programming diversity in a race-neutral way already exists. The comparative criteria provide that any applicant has the opportunity to make a claim for a comparative enhancement on the basis of a "specialized programming format" proposal. *Policy Statement*, 1 FCC 2d 393 (1965). *See also West Michigan*, 735 F.2d at 605. Under this provision, if an applicant can show that the programming he proposes is not available in a substantial amount in the marketplace, he gains a comparative enhancement. *See, e.g., Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1985), *recon. granted in part, remanded*, 3 FCC Rcd 6216 (Rev. Bd. 1988). This incentive motivates applicants irrespective of their race or ethnicity.

Under any of these approaches, diversity is enhanced as the needs and interests of members of various ethnic

or minority groups in the community are reflected in the licensee's programming. This is achieved without consideration of the race or ethnicity of the station owner.

II. THE MINORITY PREFERENCE POLICY IS NOT NARROWLY TAILORED TO ACHIEVE THE GOAL OF PROGRAM DIVERSITY

Let us assume, *arguendo*, that the government's interest in diversity in broadcast programming is sufficiently compelling to justify the use of race-specific criteria. Nevertheless, the premise that "diverse programming" will necessarily flow from the fact of minority or ethnic ownership, *see Garrett*, 513 F.2d 1056, is hopelessly problematic. The idea simply cannot be translated into the practical tool needed to fashion a narrowly tailored result. As noted by Justice Powell in *Wygant*, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S. at 280, *citing Fullilove*, 448 U.S. at 537.

This difficulty manifests itself in at least two ways. First, defining ethnic or minority programming is virtually impossible and, in any case, would propagate rather than dispel ugly stereotypes. Second, there is no evidence to support the *Garrett* court's *a priori* presumption that station owners who are members of an ethnic or minority group will broadcast points of view that are "diverse" in any sense that can be correlated with their ethnic or minority status. Galaxy submits that neither of these difficulties can be addressed with the degree of precision required by the "narrowly tailored" test.

A broadcast station's "programming" is ordinarily understood to include two categories: entertainment and non-entertainment programming (*i.e.*, news, public affairs, etc.). Under the *TV 9* line of cases, the First Amendment benefits thought to be gained by the minority

preference scheme relate to the presentation of news and editorials, rather than to entertainment programming (*e.g.*, music, situation comedies, etc.). Accordingly, the program diversity rationale assumes (a) that there is a meaningful connection between one's ethnic group or race and one's point of view; and (b) that the perspectives characteristic of an owner's ethnicity or race will necessarily be reflected in a station's news and editorials. These assumptions are invalid.

First, one must engage in the most repugnant form of stereotyping even to posit that there are political views that a minority person has that are characteristic of his race. One's political and social views are the result of innumerable and largely unquantifiable influences of which racial background is only one. A connection so tenuous as this—between the color of one's skin and the bent of one's politics—should never have been accorded the axiomatic status it achieved in *TV 9* and *Garrett*, and which was ratified in *West Michigan*. Since such a correlation never could be established, the assumption must be rejected.

Moreover, even if race or culture were a measurable factor in a licensee's outlook so as arguably to have some influence on the points of view the station disseminates, there is a much more significant factor influencing programming decisions. Minority broadcasters, like all broadcasters, operate within the confines of the marketplace. To succeed, they must be willing to respond to market demands which may or may not accommodate particular points of view or program formats.

It is this dynamic between the broadcaster and his audience which shapes his programming policies, with minimal involvement by the FCC. To our knowledge, the FCC has never attempted to set forth a definition, or even to characterize, for example, "Black" or "American Indian" programming. Indeed, to do so would be to engage in ethnic and racial stereotyping, and only perpet-

uate images which any legitimate form of affirmative action is intended to break down forever.

In sum, the minority preference policy cannot be narrowly tailored to achieve program diversity. The concept of "minority programming" is inherently vague and, what is worse, employs the lingering ethnic and racial stereotpyes which a constitutionally valid plan must avoid.

CONCLUSION

For the foregoing reasons, the judgment of the court in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), insofar as it affirmed the constitutionality of the FCC's minority preference policy, should be reversed.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

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No. 89-453

In the

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC., Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, Et Al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

The Associated General Contractors of America, Inc., with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the petitioner. The letters of consent have been filed separately herewith.

INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918. AGC regularly represents the interests of the construction industry throughout the United States. AGC counts approximately 8,000 of the nation's leading general construction contractors among its approximately 32,500 members. These contractors are engaged in all forms of commercial construction and are responsible for most of the nation's highways, bridges, commercial buildings, industrial facilities, and municipal utilities. AGC has 102 local chapters, repre-

senting each of the 50 states. AGC members perform a very substantial amount of construction for many federal agencies.

AGC represents its members in judicial proceedings, in the United States Congress, and before federal Executive agencies. AGC members have a great interest in public contracting policies and procedures because they are directly engaged in the construction and reconstruction of most of the nation's infrastructure. As an *amicus curiae*, AGC filed a brief in the Fourth Circuit in *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1986), and in this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). AGC chapters have been parties in several related cases, including *Michigan Road Builders Ass'n. Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd.*, 109 S. Ct. 1333 (1989) and *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).

AGC's long-standing policy is to provide strong support for open, competitive bidding for public construction contracts. The purpose of competitive bidding, and AGC's related policy, "is to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940). Notwithstanding the merits of competitive bidding, the federal government has begun to move away from that impartial system. Federal agencies have woven a large and increasing number of racial criteria into public construction contracts. AGC is concerned that a decision to sustain the Federal Communication Commission's policy would encourage federal agencies and Congress itself to perpetuate these racial classifications. This case directly touches the national concerns of an industry burdened by a resurgence of racial classifications over the last decade.

SUMMARY OF ARGUMENT

The Court reaffirmed last Term that the right to be free from invidious discrimination is not a privilege bestowed by the government on certain select groups, but is an inalienable right shared by each citizen in a Nation dedicated to the primacy of the individual and

equality under law. This bedrock guaranty of nondiscrimination, so noble in principle, finds itself sacrificed in practice. The constitutional prohibition against governmental prejudgment on those paradigms of the invidious – race and ethnicity – has given way not to any claim that temporary adjustment is necessary to ensure equal treatment of others, but to crude stereotype and naked social engineering.

Specifically, the Federal Communications Commission ("Commission"), which has concededly never discriminated against Hispanics or the other groups receiving this rigid racial preference, has now determined that discrimination designed to increase the "representation" of certain groups in the broadcasting industry serves society's interest in making the airwaves more "diverse." We contend that use of racial distinctions for this purpose cannot be countenanced, but must be reserved for those rare situations where it is essential to extinguish an egregious and intransigent pattern of discriminatory conduct. In all events, the principle of nondiscrimination surely cannot be sacrificed in circumstances where, as here, there is a nonracial alternative that will directly advance the government's purported interest. This analysis obtains notwithstanding that the racial discrimination here is being practiced by the federal government, particularly since that discrimination is not remedial, is not attributable to Congress, and is not imposed pursuant to Section 5 of the Fourteenth Amendment.

ARGUMENT

Last Term's seminal decision in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), gave voice, firm and clear, to certain basic precepts about the nature and meaning of equality under the law – our Constitution's solemn promise to every individual.[1] When measured against any one of these fundamental precepts, the Commission's racially preferential licensing policy must fall.

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[1] These principles had been reflected in earlier decisions of the Court, but had never before commanded a majority opinion.

First, and most fundamentally, the fact that an official racial classification, such as the Commission's licensing policy in this case, disadvantages nonminorities rather than a "discrete and insular minorit[y]"[2] is without constitutional significance. *Croson* "reaffirm[ed] the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."[3] *Croson*, 109 S.Ct. at 721. Accordingly, "racial classifications of any sort must be subjected to 'strict scrutiny'." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring). *See Croson*, 109 S.Ct. at 721; *Ward v. Rock Against Racism*, ___ U.S. ____, 109 S. Ct. 2746, 2758 n. 6 (1989); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724 n. 9 (1982). Thus, "to pass constitutional muster, [racial classifications] must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of [their] legitimate purpose." *Palmore v. Sidoti*, 466 U.S. 429, 432-433 (1984), quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

Croson also reaffirmed the principle that a racial preference is subject to an extraordinarily demanding standard of justification regardless of the relative "ability of different groups to defend their interests in the representative process." *Croson*, 109 S. Ct. at 722. This principle follows from the fact that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Id.* at 721, quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).[4] That being so, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person

[2] *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

[3] *See also Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-80 (1986); *id.* at 285, 286 (O'Connor, J., concurring); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (opinion of Powell, J.).

[4] *See also Bakke*, 438 U.S. at 299 ("[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group.").

of another color." *Croson*, 109 S. Ct. at 721, quoting *University of California Regents v. Bakke*, 438 U.S. 265, 289-90 (1978).[5]

Moreover, race and ethnicity are "factor[s] having no relation to individual worth." *Croson*, 109 S. Ct. at 721, quoting *Bakke*, 438 U.S. at 298.[6] Accordingly, a government policy that takes account of an immutable trait that says nothing about the needs, abilities, interests, or aspirations of individual citizens, is quite naturally viewed with suspicion. *McCleskey v. Kemp*, 481 U.S. 279, 336 (1987) (Brennan, J., dissenting) (state actions suspect when based on the "categorical assessment of the worth of human beings . . . insensitive to whatever qualities the individuals in question may possess").

In short, *Croson* plainly establishes that the Constitution's equal protection guaranty protects not classes, but people, prohibiting the official burdening of any individual on the basis of racial classifications that "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

[5] Since the "core purpose of the Fourteenth Amendment was to do away with all governmental imposed discrimination based on race," the equal protection of laws must mean that any official racial discrimination — regardless of the victim's race — is almost always invalid. *Palmore*, 466 U.S. at 432. *See also McCleskey v. Kemp*, 481 U.S. 279, 340-41 (1987), (Brennan, J., dissenting) ("Race is a consideration whose influence is expressly constitutionally proscribed. We have expressed a moral commitment, as embodied in our fundamental law, that this specific characteristic should not be the basis for allotting burdens and benefits."); *Korematsu v. United States*, 323 U.S. 214, 235-40 (1944), (Murphy, J., dissenting) ("To give constitutional sanction to [racial discrimination is] to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."), cited in *Croson*, 109 S. Ct. at 724.

[6] *See also id.* at 727, quoting *Fullilove*, 448 U.S. at 533-35 ("Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."); *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (illegitimacy "bears no relation to the individual's ability to participate in and contribute to society"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society."); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (race and national origin are "seldom relevant to the achievement of any legitimate state interest"); *id.* at 451 (Stevens, J., concurring).

Since all individuals have the same constitutional right to be free from official racial and ethnic discrimination, and since race and ethnicity say nothing about an individual's worth, the question arises whether a government can ever have a legitimate, let alone compelling, interest in distinguishing among its citizens on the basis of such inherently irrelevant traits. The answer, according to *Croson*, is that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Croson*, 109 S. Ct. at 729. In other words, government may take account of the extent to which one's race would operate as an impediment to his full enjoyment of the relevant government program or benefit, absent some race-conscious countermeasure. In such narrow circumstances, the government is not suggesting that it attaches any importance to skin color, but rather that it has been compelled to make reference to color because the failure to do so would leave in place intransigent exclusionary barriers rooted in past intentional discrimination.

For this reason, the Court has never upheld race-conscious action unless it was necessary to eliminate the lingering exclusionary barriers created by an entrenched pattern of egregious official discrimination. *See Local 28, Sheetmetal Workers International Ass'n. v. EEOC*, 478 U.S. 421, 445, 474 (1986) (racial preference "necessary in order to effectively enforce Title VII [by] . . . dismantl[ing] prior patterns of employment discrimination and . . . prevent[ing] discrimination in the future" by a defendant who "has engaged in persistent or egregious discrimination"); *United States v. Paradise*, 480 U.S. 149, 171-172 (1987) ("long term, open and pervasive discrimination"); *Fullilove*, 448 U.S. at 478 (minority business program directed at "the existence and maintenance of barriers to competitive access which have their roots in racial and ethnic discrimination"); *id.* at 483.

In these circumstances, the government is not distinguishing between minorities and nonminorities on the basis of race as such, but on the basis of their dissimilar likelihood of being excluded, absent racial countermeasures, by the discriminatory barriers that remain in place. *Croson*, 109 S. Ct. at 722. Conversely, this Court has emphatically rejected every other purported justification for race-conscious measures. The Court has consistently ruled that government may not favor an individual in order to increase the representation of his racial

group so that it more nearly mirrors the group's representation in the community. Any such attempt to "correct" "underrepresentation" is nothing more than "discrimination for its own sake." *Bakke*, 438 U.S. at 307.[7]

For essentially the same reason, the Court has rejected as illegitimate the goal of remedying "societal discrimination." *Croson*, 109 S. Ct. at 723.[8] Since the "societal discrimination" rationale is indifferent to whether there was or is any discrimination in the particular program, it authorizes the government to introduce race into a program as an eligibility criteria for the first time even where there have been no race-based barriers to minority advancement, or at least none that cannot be overcome without disadvantaging nonminorities on a racial basis. Accordingly, the Court has rejected societal discrimination as "too amorphous a basis for awarding a racially classified remedy," for it would permit a court to "uphold remedies that are ageless in their reach into the past and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276. *See Croson*, 109 S.Ct. at 723.

The Court has similarly rejected any standard that equates a statistical imbalance in the relevant program with lingering discrimination. It is "completely unrealistic," the Court has noted, to assume that, absent discrimination, racial or ethnic proportionality would result in a field of endeavor; thus an imbalance provides no warrant for employing racial preferences. *Croson*, 109 S. Ct. at 728.

In keeping with the severity of the strict scrutiny standard for testing racial preferences, the Court has imposed an equally severe

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[7] *See also Croson*, 109 S. Ct. at 728 ("[It] cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."); *Local 28*, 478 U.S. at 485 (Powell, J., concurring) ("A court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination."); *id.* at 487 (O'Connor, J., concurring) ("The imposition of a quota is therefore not truly remedial, but rather amounts to a requirement of racial balance."); *Bazemore v. Friday*, 478 U.S. 385 (1986).

[8] *See Wygant*, 476 U.S. at 274, 276 ("prior discrimination by the governmental unit involved" is required); *Local Number 93, International Ass'n. of Firefighters v. City of Cleveland*, 478 U.S. 501, 532 (1986) (White, J., dissenting) ("An employer may adopt . . . racially discriminatory hiring or promotion practices . . . only as a remedy for its own prior discriminatory practices.").

evidentiary burden on those who claim that their activities are or have been infested with a "pattern of deliberate exclusion" that needs to be broken down through new discrimination. First, "particularized findings" of past invidious discrimination in the program must be made. *Id.* at 723, quoting *Wygant*, 476 U.S. at 276. Such findings must be supported by a "strong basis in evidence." *Id.* at 724, quoting *Wygant*, 476 U.S. at 277.[9]

An equally important safeguard against the premature use of race-conscious measures — that is, their use other than as a necessary last resort — is the requirement of narrow tailoring. The key requirement in this regard is that defendant show that "less intrusive alternatives," such as victim-specific relief, are unavailable or unavailing.[10]

The Commission's racially preferential licensing policy plainly fails every element of the "strict scrutiny" test. The Commission's blanket racial preferences are neither designed nor necessary to remedy any discrimination anywhere identified, and the purported nonremedial justification is not only facially invalid and devoid of any limiting principle, but amounts to little more than a crude racial stereotype. Further, for the reasons we discuss presently, it is quite clear that this analysis obtains here notwithstanding the fact that the federal, rather than a state, government is engaging in this invidious discrimination.

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[9] The minimum showing from which an inference of discriminatory exclusion could arise is one that establishes a significant statistical disparity between the number of qualified minorities willing and able to participate in the activity and the number of minorities actually participating. *Croson*, 109 S. Ct. at 729.

[10] It is well established that since the use of race must be "necessary" to accomplish a compelling purpose, existence of a less discriminatory method renders the racial classification invalid. See, *e.g.*, *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 279 n. 6 ("[T]he classification at issue must 'fit' with greater precision than any alternative means."); *Ward v. Rock Against Racism*, ___ U.S. ___ 109 S. Ct. 2746, 2758, n. 6 (1989) (*Croson* "is a strict scrutiny case" and "least intrusive means" analysis therefore applies); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

A. Strict Scrutiny Applies To The Commission's Racially Preferential Policy

The threshold issue here is whether the strict scrutiny standard affirmed in *Croson* applies, and applies in the same way, to the racial classification contained in this *federal* program. Some members of the Court have indicated that the "unique remedial powers of Congress under Section 5 of the Fourteenth Amendment" allow the federal legislature somewhat broader latitude in invoking race-conscious remedies than is available to states. *Croson*, 109 S. Ct. at 718-719.[11] Whether and to what extent this is true need not be resolved here, because the Commission's racial preference scheme is not remedial, is not attributable to Congress, and is certainly not enacted under Section 5 of the Fourteenth Amendment.

1. As an initial matter, we note that Congress did not enact the policy at issue here. It was, rather, established by the Commission, or more accurately, by the Court of Appeals for the District of Columbia Circuit, which required the Commission to impose these racial preferences against its wishes. *See TV 9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973); *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Congress' exclusive role in the matter has been to stop the Commission, through an appropriations rider, from determining whether any empirical or other support existed for either its remedial or diversity rationale — support that the Commission conceded was theretofore entirely lacking. *See Winter Park Communications v. FCC*, 873 F.2d 347, 363 (D.C. Cir. 1989) (dissenting opinion).

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[11] Justice O'Connor and Justice White indicated in *Croson* that, under *Fullilove*, some amount of additional deference is owed to Congress' remedial efforts under Section 5. *Id.* at 718-721. Justice Kennedy did not join this portion of the opinion and suggested that this rule is a "difficult proposition." *Id.* at 734. Justice Scalia believes that uniform standards should apply to all racial preferences. *Id.* at 735. The Chief Justice's views are not entirely clear; although he joined the relevant portion of Justice O'Connor's opinion in *Croson*, he also joined Justice Stewart's dissent in *Fullilove*, which expressly rejected the notion that race-conscious action is somehow entitled to less searching scrutiny because it is enacted by Congress. *Fullilove*, 448 U.S. at 523. Finally, the dissenters in *Croson* also appeared to reject the notion that different standards apply to the actions of federal and state governments in this area. *Croson*, 109 S. Ct. at 755.

Passing the point that this congressional interference with the Commission's "execution of the laws" is itself of doubtful constitutional validity,[12] the sum total of Congress' involvement in the issue was to force a "mental standstill" at the Commission while the agency was in the midst of belatedly seeking to discern for itself whether its racial discrimination had any rational foundation. *Id.* at 364. While the funding rider obviously had the effect of freezing the Commission's policy in place, and was apparently intended as a *post hoc* endorsement of the *status quo ante* by those few legislators who may have known of its existence, the fact remains that the policy thereby frozen was the Commission's, not Congress'.

Thus, no deference is owing to a congressional judgment here, especially since Congress' only judgment was to "endorse" a racial diversity policy by preventing the relevant agency from examining whether there was any factual basis for the policy. *Winter Park*, 873 F.2d at 351.[13] A federal administrative agency must have a particularly strong and explicit mandate from Congress if it seeks to cloak itself with the federal legislative power when defending a policy that raises serious equal protection concerns. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114, n. 46 (1976) (In light of discriminatory immigration policy, the Court "require[d] a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule.").

On its own account, the Commission is obviously entitled to no deference beyond that afforded state or local governments, since it clearly possesses no civil rights expertise. *See Fullilove*, 448 U.S. at 468; *id.* at 515-516 and n.14 (Powell, J., concurring); *Bakke*, 438 U.S. at 309-310; *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring) ("competent" authority required). In fact, the federal department having such expertise, the Department of Justice, has concluded in this very case that the Commission's policy is unconstitutional. *See Winter Park*, 873 F.2d at 352.

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[12] *Bowsher v. Synar*, 478 U.S. 714, 736 (1986). *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

[13] Of course, it was only after Congress had announced that there was a nexus between race and diversity that the Congressional Research Service completed the FCC study on whether some such support could be found.

2. Moreover, even assuming that the Commission's policy is attributable to Congress, it clearly is not attributable to any congressional action taken pursuant to Section 5 of the Fourteenth Amendment. As a result, there is no basis for subjecting the Commission's racially preferential policy to review less strict than that applied to the city in *Croson*.

Section 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719, quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (hereinafter "*Morgan*"). Since the Fourteenth Amendment, by its terms, applies only to the states, it obviously cannot provide Congress with any remedial power, unique or otherwise, concerning the actions of the *federal* government.

Section 5 gives Congress special competence and authority over the affairs of state governments in matters potentially affecting equal protection guaranties. Under Section 5, Congress has the ability to enforce the scope of the Fourteenth Amendment's nondiscrimination principle, a role that is in other contexts performed exclusively by the judiciary. *See Morgan*, 384 U.S. at 651; *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (enforcement power under Section 2 of the Fifteenth Amendment). And Congress' "power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S. Ct. at 719 (emphasis in original). As a result of Congress' unique role of insuring the states' compliance with the Fourteenth Amendment, the courts give special deference to congressional efforts to enforce this nondiscrimination guaranty.

In the context of race-conscious classifications, the lead opinion of *Fullilove* concluded that congressional imposition of racial "goals" on states in connection with their federally funded contracting program was due special deference as an exercise of Congress' Section 5 authority. *Fullilove*, 448 U.S. at 483-484. Since Congress had mandated these race-conscious measures, and since they were directed at historically entrenched discriminatory barriers existing in the state

programs, the plurality was more inclined to presume that the policy, taken as a whole, was generally remedial in purpose. Thus, because Congress has a "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," the Court accords special deference to Congress' views concerning the measures necessary or appropriate to prevent or remedy potential violations of the Amendment. *Croson*, 109 S. Ct. at 719.

But Congress has no such special competence, and thus deserves no special deference (save that normally accorded a coordinate branch of government) where, as here, it is not redressing any perceived discrimination by the states, but is simply using a suspect criterion in a purely federal program enacted pursuant to the commerce or spending powers. When there is no issue concerning the states' compliance with the Fourteenth Amendment, Congress cannot invoke its role under Section 5 as an enforcer to justify its racially preferential policies; it is only a discriminator. In this context, the Constitution's equal protection guaranties operate solely as "an explicit *constraint*" on federal power, not as a source of power. *Croson*, 109 S. Ct. at 719. Since Congress in these circumstances wears only one hat with respect to the Constitution's nondiscrimination principle, it is judged on the same terms as a state government: it has no greater authority to rely on "odious" criteria as a means of conferring public benefits or burdens.[14]

Any doubts in this regard are dispelled by the treatment given by this Court to Congress' use of suspect or quasi-suspect classifications in federal programs. The Court has repeatedly rejected Congress' use of gender-based classifications in a variety of contexts without giving any special deference to Congress' remedial or fact-finding powers. Many of these statutes were intended by Congress to provide a "benign" or "remedial" advantage to women. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v.*

[14] *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas, these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."); *Hogan*, 458 U.S. at 732-33 ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.").

Richardson, 411 U.S. 677 (1973); *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Nonetheless, in each such case the Court independently examined and rejected the factual assumptions underlying these classifications. While Congress' gender-based distinctions may have been empirically justified as a general matter, they were nonetheless impermissibly overbroad in that they used gender as a "proxy for other, more germane bases of classification." *Craig v. Boren*, 429 U.S. 190, 198 (1976). *See also Wiesenfeld*, 420 U.S. at 645; *Goldfarb*, 430 U.S. at 205-206; *Frontiero*, 411 U.S. at 690. Indeed, two such cases, *Wiesenfeld* and *Frontiero*, were cited in *Croson* as examples of cases in which the Court will not defer to congressional recitation of a benign or legitimate purpose. *Croson*, 109 S. Ct. at 724, 729.

It is true that the Court did accede in one case to this sort of generalized congressional "fact finding" in a nonremedial setting, but *Croson*'s citation of that regrettable decision's *dissent* reflects that in recent times "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *See Korematsu v. United States*, 323 U.S. 214, 235-240 (1944) (Murphy, J., dissenting); *Croson*, 109 S. Ct. at 725.

Further, quite apart from the extent and sources of Congress' remedial power in the area of civil rights, Congress surely has no such power to authorize a racial preference where the preference serves no remedial purpose. Since, for the reasons discussed more fully below, the congressional policy here was not claimed to be and could not reasonably be viewed as "remedial," and since there is nothing unique about Congress' ability to discern the relationship, if any, between minority ownership and content of programming, strict scrutiny applies with full force to the Commission's discriminatory licensing policy. *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 923 (D.C. Cir. 1989) (opinion of Silberman, J.).[15]

[15] Even if the standards articulated by the *Fullilove* plurality fully applied here, the equal protection analysis would not markedly change and certainly not in any way that would affect the disposition of the case. A comparison of that case and *Croson* reveals that Congress differs from other government actors only to the extent that it is relieved of the responsibility to make "specific findings of discrimination to engage in race-conscious relief." *Croson*, 109 S. Ct. at 719. (Three Justices comprising the *Fullilove* majority would have applied a more lenient standard, but this analysis was

Finally, if the Court nonetheless reaches the question of Congress' remedial authority, it should reaffirm that "Congress' power under § 5 . . . 'is limited to adopting measures to enforce the guarantees of the [A]mendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.'" *Hogan*, 458 U.S. at 732, quoting *Morgan*, 384 U.S. at 651 n. 10. Since the equal protection guaranties of the Fifth and Fourteenth Amendments are "precisely the same" (*Wiesenfeld*, 420 U.S. at 638 n.2), there is no basis in law or logic for holding that an "equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress." *Croson*, 109 S. Ct. at 734 (Kennedy, J., concurring).[16]

B. The Commission's Racial Preferences Are Not Justified By A Compelling Governmental Interest

There are two purposes potentially underlying the Commission's racial preferences — to provide a remedy for past discrimination and to promote "diversity." Neither suffices, however, because the Commission has admitted that its racial preferences do not serve any remedial goal, and this Court has made clear that such discriminatory devices cannot be justified by any nonremedial goal. We will examine each point in turn.

1. The Commission's disavowal of any intended remedial purpose should foreclose inquiry into this basis for sustaining its racial discrimination.[17] In any event, the only statement or evidence conceivably related to discrimination of any kind is the assertion contained in the Congressional Report accompanying establishment of a racially preferential lottery for broadcast licenses. That report states that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the mass media communication, as it has adversely affected their participation in other sectors of the economy as well." H.R. Conf. Rep. No. 765, 97th Cong. 2d Sess. 43 (1982). *See also Shurberg*, 876 F.2d at 914-918.

As the Report's references to "underrepresentation" and "other sectors of the economy" demonstrates, Congress' comments concerned at most societal discrimination. Moreover, the cited underrepresentation is devoid of probative value because the statistical benchmark is apparently gross population figures, rather than the "number of qualified minority [firms] willing and able to perform." *Croson*, 109 S.Ct. at 729. Nor is there any evidence suggesting past discrimination by the "particular governmental unit involved." *Wygant*, 426 U.S. at 724. *See also Firefighters v. City of Cleveland*, 478 U.S. at 532 (White, J., dissenting) ("An employer may . . . engage in racially discriminatory hiring or promotion practices . . . only as a remedy for its own prior discriminatory practices."). *Croson* reaffirmed that such a specific showing of discrimination is constitutionally required.[18]

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premised on the view that equal protection safeguards differ for minorities and nonminorities, which is contrary to the holding in *Croson*.) Congress must, however, have a "strong basis in evidence" before it embarks on any such remedial effort. *Croson*, 109 S.Ct. at 724; *Fullilove*, 448 U.S. at 477-78 ("abundant evidence"). Moreover, both *Fullilove* and *Croson* recognize that Congress' identification of a national problem does not provide a basis for *implementing* a remedial program at the local level in a race-conscious manner absent an additional showing that each local application is genuinely remedial — that is, limited to those who have actually been harmed by prior local discrimination. Since national programs of the sort established in *Fullilove* must "explicitly recogniz[e] that the scope of the problem would vary from market area to market area," each locale must "identify the discrimination it seeks to remedy in its own jurisdiction." *Croson*, 109 S. Ct. at 726-27. In this regard, the *Fullilove* plurality also stressed that any preference should be given only to those firms "whose competitive position is impaired by the effects of disadvantage and discrimination." *Id.* at 471; *see also id.* at 464. As *Croson* noted, "the Chief Justice indicated that without this fine tuning to remedial purpose, the statute would not have 'pass[ed] muster.'" *Croson*, 109 S. Ct. at 718, quoting *Fullilove*, 448 U.S. at 487. Since Congress did not possess any evidence remotely identifying any discrimination by the Commission or even in the broadcast industry generally, it plainly had no remedial justification under *Fullilove*.

[16] This Court has repeatedly held that Congress' ability to enforce equal protection guaranties does not authorize it to rachet down those same guaranties. *E.g.*, *Morgan*, 384 U.S. at 651 n.10.

[17] The Commission has repeatedly disavowed that there is any remedial purpose underlying its policies. *Winter Park*, 873 F.2d at 363 (dissenting opinion). When the Court is applying strict scrutiny or reviewing the action of an administrative agency, it will not supply an interest not asserted or relied upon by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Hogan*, 458 U.S. at 730; *Edwards v. Aguillard*, 482 U.S. 578, 594-595 (1987). Nor, for the reasons discussed above, did Congress supply the necessary remedial predicate here.

[18] The burden is on the defendant to show that its program is narrowly tailored to serve a compelling government interest. *See, e.g., Bakke*, 438 U.S. at 311 ("Petitioner

To be sure, *Croson* stated that government need not blind itself to the fact that private discrimination in some circumstances may create "discriminatory exclusion" from government programs as effectively as if government employees themselves were engaging in such invidious practices. *Id.* at 726. In *Croson*, for example, if "the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could have taken action to end the discriminatory exclusion." *Id.* at 726. Thus, if the state or local government becomes a "passive participant" in a system rife with discrimination, it need not sit back and watch discriminatory actions infect its program. *Id.* at 720.

Of course, *Croson*'s recognition that a state should not "exacerbate," "induce," "encourage," "assist," or otherwise become a "joint" or "passive participant" in private discrimination hardly suggests that the existence of unrelated private prejudice not tied to the government program would afford a remedial predicate for racial preferences.[19] Indeed, any more expansive understanding of *Croson*'s teaching in this regard would nullify the majority opinion's repeated, unequivocal admonition that one organ of government cannot "extrapolate" a remedial predicate from discrimination unrelated to the program involved. *Id.* at 727.

First, as previously indicated, the *Croson* Court made clear that a congressional finding of societal discrimination, under either the *Fullilove* or *Croson* standard, does not suffice to authorize racially preferential action in a particular program. For example, Congress' finding that there "had been nationwide discrimination in the construction industry" was of "extremely limited" probative value because

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did not carry its burden of demonstrating that it must prefer members of particular ethnic groups in order to promote better health-care delivery to deprived citizens."); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *Minneapolis Star and Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575, 592-93 (1983); *Hogan*, 458 U.S. at 730 n. 16 (1982).

[19] Of course, an appropriate governmental body may prevent and punish invidious private discrimination without any showing whatever; the requirement of precisely identifying existing discriminatory exclusion is needed only if the governmental actor seeks to require or engage in racial discrimination.

"Congress has made national findings that there has been societal discrimination in a host of fields." *Id.* at 726-727. The Court also held that seeking to remedy discrimination in an entire industry swept with too broad a brush. As the Court put it: "Like the role model theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.* at 723.

Nor may geographically removed "findings of discrimination . . . be 'shared' from jurisdiction to jurisdiction." *Id.* at 727 ("We have never approved the extrapolation of discrimination of one jurisdiction from the experience of another."). Similarly, the necessary finding of "systematic exclusion" from the relevant program is not satisfied by a finding of discrimination that is geographically related (i.e., "school desegregation in Richmond") but "does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy." *Croson*, 109 S. Ct. at 727. Since such unfocused or irrelevant findings of discrimination shed no light on what, if any, exclusionary devices would be confronted today by a minority participant in the program, they "could justify a preference of any size or duration." *Id.* at 727.

It is thus "essential" for a government body, such as the Commission in this case, to supplement any general congressional findings with specific findings of "discrimination in their own bailiwicks." *Id.* at 727. In this case, as in *Croson*, there is no evidence that "qualified minority [applicants] were passed over for [broadcast licenses]." *Id.* at 730. Given the highly structured adjudicatory procedures that are used in comparative hearings, as well as the elaborate review process, it would be most surprising if any such discrimination could seep into the process undetected by either the Commission or the District of Columbia Circuit Court of Appeals. Moreover, the private broadcast industry is not able to influence the access of minority broadcasters to federal licenses in a manner analogous to the control exercised by prime contractors in Richmond of minority subcontracting firms. Nor do broadcasters receive "public dollars" from the Commission. *Id.* at 720. There is thus no possibility that the Commission will play a role as a joint participant, analogous to that of the city in *Croson*, with any private discriminator bent on excluding minorities. In all events,

neither Congress nor the Commission has referred to any evidence of racial discrimination in the broadcast industry.

The only barrier identified thus far is that minorities as a rule have less capital than nonminorities. *See Shurberg*, 876 F.2d at 914 and n.15. Lack of money can hardly be viewed as a barrier, discriminatory or otherwise, erected by a government program. *Cf. Harris v. McRae*, 448 U.S. at 297, 316-317 (1980).[20] It is simply one of many "nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise." *Id.* at 722-723. *Croson* held that such factors may be addressed only through "race-neutral devices to increase the accessibility of . . . opportunities to small entrepreneurs of all races." *Id.* at 729.[21]

Introducing race into the Commission's selection process would not affect, let alone remedy, whatever problems minorities tend to have in getting financing. Indeed, any such preference goes, by definition, not to the disadvantaged, but to those who already have sufficient funds to start a television station and to secure necessary financing. Thus, those minorities "who benefit from the disparate treatment are those who were . . . not 'needy [ ]' and who are 'least likely to have been victims of . . . discrimination.'" *Orr v. Orr*, 440 U.S. 268, 282 (1979) (citations omitted). Such a "[race]-based classification which, as compared to a [race]-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny." *Id.* at 282-283.[22]

[20] The Commission does not charge fees or otherwise extract consideration for the valuable broadcast licenses; it simply ensures that applicants have the minimum financing necessary to operate the station if they receive a license.

[21] Moreover, even if the Commission were shown to have taken actions with a discriminatory effect, remedial action would not be justified, for it is only "*deliberate* exclusion" of minorities that supplies a potential remedial predicate. *Croson*, 109 S. Ct. at 729 (emphasis added). *Accord*, *Wygant*, 476 U.S. at 284 n.13 ("prior, purposeful discrimination"); *Local 28*, 478 U.S. at 445 ("egregious discrimination"). Moreover, "findings of a constitutional or statutory violation must be made" before embarking on any race-conscious scheme. *Croson*, 109 S. Ct at 729. Since the Commission is not subject to any statutory effects tests in its licensing practices, but only the Constitution's intent standard, it cannot supply the requisite legal violation absent finding purposeful discrimination. *Washington v. Davis*, 426 U.S. 229 (1976). *See Bazemore, supra.* In any event, only a most bizarre theory of remedies would authorize intentional racial discrimination of the sort that would otherwise violate the Constitution to "remedy" constitutionally permissible neutral practices that have a disproportionate burden.

The absence of any remedial justification for the Commission's discriminatory licensing policy renders it unconstitutional. In *Croson* five Members of the Court squarely held that "classifications based on race" are "strictly reserved for remedial settings." *Id.* at 721.[23] The Court should reaffirm that holding.

Any nonremedial justification, by definition, injects considerations of race not because it has been made relevant by the prior invidious discrimination of others, but because government itself has made it relevant to achieve its own purposes. "[S]uch a result would be contrary to both the letter and spirit of the constitutional provision whose central command is equality." *Croson*, 109 S. Ct. at 727. *See also DeFunis v. Odegaard*, 416 U.S. at 342 (Douglas, J., dissenting) ("The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."). But even were it possible to hypothesize a nonremedial justification without these fatal deficiencies, it certainly would not be the one offered by the Commission here, for inherent in the diversity rationale is the racial stereotyping that normally typify such nonremedial theories.

[22] Also as in *Croson*, there "is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the [Commission's operations]." *Id.* at 727-728 (emphasis in original). Also as in *Croson*, "[t]he gross over-inclusiveness of [this] racial preference strongly impugns [any] claim of remedial motivation." *Id.* at 728.

[23] The *Croson* majority thus acknowledged the "requirement that [a defendant] identify the discrimination it seeks to *remedy*" as the *sine qua non* of any official race-conscious measure. *Id.* at 727 (emphasis added). The Court also stated that the City of Richmond had violated the Constitution "*because* [it] failed to identify a need for remedial action." *Id.* at 730. Similarly, the *Croson* Court noted that the "role model" theory was rejected in *Wygant* precisely because it "had no relation to some basis for believing a constitutional or statutory violation had occurred." *Id.* at 723. *See id.* at 730-731 n. 1 (Stevens, J., concurring) ("But unlike the Court, I would not totally discount the legitimacy of [nonremedial] race-based decisions that may produce tangible and fully justified future benefits."). Likewise, the *Wygant* plurality acknowledged the "requirement that race-based state action be remedial." *Wygant*, 476 U.S. at 278. *See ibid.* ("The trial court *must* make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.") (emphasis added).

2. Since neither Metro nor Rainbow owns other broadcast properties, selection of either to receive the contested license would result in "diversity" as that term is traditionally understood at the Commission: a new and, in that sense, distinct voice on the broadcast spectrum. *See FCC v. NCCB*, 436 U.S. 775 (1978). Yet only Rainbow received the preference. It was preferred not because of any distinctive programming it offered, a factor to which the Commission is indifferent, but because its principals are "Spanish-surnamed."

There are two potential reasons why the Commission viewed the Rainbow owners' ancestry as relevant to "diversity," as it now defines that term. First, the Commission might have thought it desirable to have more Hispanics owning radio and television stations, at least until the percentage of Hispanic owners roughly approximated their representation in the general population. Second, it might have believed that Hispanics as a group disproportionately possess a trait that is important to meritorious broadcast service — namely, a greater propensity to engage in "minority programming." Either of these justifications would be at war with the Court's precedent and any meaningful principle of equal treatment.

If the former interest is being served by the Commission, such "discrimination for its own sake" is, as we have previously noted, facially unconstitutional. *Bakke*, 438 U.S. at 307. The latter interest is equally illegitimate, for it uses the irrelevant characteristic of race as a proxy for the potentially relevant nonracial characteristic of minority programming. The Commission's use of racial discrimination in lieu of a nonracial criterion better tailored to achieve the purported goal is reason enough to condemn the Commission's scheme. The Commission's use of race is particularly offensive, however, because it is premised on the stereotypical notion that an individual has a greater affinity for his "own kind" and because it expressly disavows any interest in the potentially relevant nonracial characteristic.

In light of the Commission's schizophrenic policies toward minority ownership over the years, it is not clear whether the challenged policy uses "minority programming" as a pretext for racial discrimination in favor of minority owners, or whether it uses racial discrimination in favor of minority owners as a grossly overbroad

proxy for minority programming. Whatever the case, it is plain that the Commission is solely concerned with developing more minority owners, not with any increase in minority programming.

First, the Commission itself has repeatedly characterized its goal as correcting the underrepresentation of minority owners in the broadcast industry. It has suggested that, if this policy has any end date, it will be when the percentage of minority-owned stations is in balance with nationwide minority representation. *See Shurberg*, 876 F.2d at 906, 914-15; *Winter Park*, 873 F.2d at 360. The policy's duration will bear no relationship to the state of minority programming.

Moreover, the Commission has deliberately and faithfully ignored all of the criteria it would have examined had it been concerned with serving the needs of minority audiences. It has never defined minority programming and has never inquired into whether licensed applicants would provide "minority programming" (however defined). Nor does it inquire into whether any minorities reside in the relevant service area; or whether there are any minorities in the service area whose programming interests have not already been satisfied; or whether there are any minority station owners already in the area; or (by virtue of the congressional rider) whether there is any link between a licensee's race and the programming produced. *See TV9 Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973) (court concluded it could be assumed that minority ownership would foster program diversity); *Winter Park*, 873 F.2d at 356 (dissenting opinion); *Notice of Inquiry: In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 52 Fed. Reg. 596 (Jan. 7, 1987).

Indeed, the Commission acknowledges that it could not care less whether its racial preferences in any way enhance its ability to select a licensee who will better serve a minority audience: "[W]e reject any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed service area . . . . [T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station [was] specifically program[med] to meet minority needs." *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264-1265

(1982), *aff'd., West Michigan Broadcasting Corp. v. Federal Communications Commission*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

To be sure, the Commission's emphatic statement merely confirms that which is otherwise obvious; the Commission is not at all concerned with whether Hispanics receiving a preference will address the needs of an Hispanic audience (if one exists) or anything else about what the owner may say or show. The Commission is interested only in whether a Hispanic is saying it. Thus, the "diversity rationale" reduces to this: the Commission discriminates against some racial groups because it believes it is sociably desirable to advance the interests of other racial groups. The invidious nature of this discrimination would be palpable were the Commission awarding government contracts to build roads or missiles. Relying, however, on Justice Powell's observations in *Bakke* concerning the benefits of an integrated educational environment, the Commission maintains that its discriminatory policy should nonetheless be upheld because licensing decisions have communicative aspects, which are, in turn, affected by race and ethnicity. *See Bakke*, 438 U.S. at 311-315.

Unlike the situation addressed by Justice Powell in *Bakke* — college students living together in an integrated environment where they can develop mutual tolerance and respect for those of other races — there is little if any interaction between the owner of a broadcast station and the station's audience. Since few people know, and fewer still care, who the owner is, the owner's race simply cannot promote whatever values of tolerance or respect that may be derived from programs featuring minority group members or otherwise providing a "minority perspective" on things. Since a nonminority owner would be no less capable of providing this type of "minority programming" than a minority owner, the skin color of the owner cannot be determinative of the programming received by the community. Hence, race cannot rationally serve as a basis for preferring, say, a Hispanic over a nonminority owner who proposes to provide Spanish-language programming.

The Commission's response is that, while a nonminority owner may be *capable* of providing minority programming, he might be less *likely* to do so. The opinions below of Judge Silberman and Judge

Williams persuasively demonstrate that this proposition is extraordinarily doubtful as an empirical matter. *See Shurberg*, 876 F.2d at 921-24; *Winter Park*, 873 F.2d at 357-61.[24]

There is a more fundamental objection to the Commission's discriminatory policy, however. The Court of Appeals for the District of Columbia Circuit has put it well: "[I]t is contrary to one of our most cherished constitutional and societal principles. That principle holds that an individual's taste, beliefs and abilities should be assessed on their own merits rather than categorizing that individual as a member of a racial group presumed to think and behave in a particular way." *Steele v. FCC*, 770 F.2d 1192, 1198 (D.C. Cir. 1985), *vacated* (October 31, 1985).

Since the guaranties of the Constitution and the civil rights laws create "personal" rights, "guaranteed to the individual," the bedrock principle of nondiscrimination is that the government must treat its citizens "as *individuals*, not as simply components of a racial, religious, sexual or national class." *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083 (1983) (emphasis in original), quoting *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978). *See also Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 175 (1972) ("[T]he basic concept of our system is that the burden should bear some relationship to individual responsibility.") Accordingly, even an empirically verifiable generalization about members of a particular racial group provides no warrant for using group membership as a "proxy for other, more germane bases of classification." *Hogan*, 458 U.S. at 726, quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Manhart*, 435 U.S. at 708 ("even a true generalization about a class can not justify class-based treatment".).

For this reason, the Court has repeatedly struck down sex-based classifications that benefitted women, even though the classifications

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[24] The Commission's argument is premised on the notion that, for nonminority and minority owners alike, "dubious, ethnically-determined taste will outweigh the economic imperative of what the audience wants to hear" — a proposition that is both highly implausible and contrary to the fundamental assumptions that have driven the Commission's market-based deregulation policy over the last decade. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985) *vacated* (October 31, 1985). *See Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989); *Office of Com. of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Shurberg*, 876 F.2d at 923.

were based on accurate generalizations about men and women. "[T]he State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as by one that gender classifies." *Orr v. Orr*, 440 U.S. 268, 283 (1979).[25] Since gender-based classifications are judged only pursuant to mid-level scrutiny, and there are, albeit few, genuine differences between the sexes, these holdings apply *a fortiori* to racial and ethnic classifications.[26] Thus, in *Bakke*, the claim that minority doctors were more likely to serve disadvantaged communities was rejected as a justification for preferential medical school admissions:

> An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage.

Bakke, 438 U.S. at 311, quoting *Bakke v. Regents of University of California*, 553 P.2d 1152, 1167 (1976). *See also Palmore*, 466 U.S. at 433.

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[25] *See, e.g., Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980) ("[i]t may be that there is empirical support for the proposition that men are more likely to be the principal supporters but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative convenience"); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (law that required only husbands to pay alimony struck down because "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still 'would not adequately justify the salient features of' Alabama's statutory scheme"); *Wiesenfeld*, 420 U.S. at 645 (social security provision benefitting widows struck down; "the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support . . . [b]ut such a gender-based generalization cannot suffice"); *Goldfarb*, 430 U.S. at 205-206 (same); *Frontiero*, 411 U.S. at 689-90 (law favoring serviceman struck down). *Cf. City of Los Angeles Depart. of Water and Power v. Manhart*, 435 U.S. 702, 704-12 (1978) (sex based actuarial tables violate Title VII); *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-84 (1983) (same).

[26] *See, e.g., Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 279 ("The classification at issue must 'fit' with greater precision than any alternative means."); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Indeed, the Court has reserved its harshest condemnation for racial prejudgments of the sort relied on here — those holding that group membership is relevant because it reflects something about the way individuals in the group think and behave. The Commission's policy is unquestionably premised on such a racial stereotype. For its racial preferences to make any sense at all, the Commission must believe that members of a racial group tend to think and behave alike. Otherwise a Hispanic would have no greater insight into the needs of a Hispanic audience and would not better "represent" their thinking than would a non-Hispanic. Public policy should not be based on the expectation or assumption that minorities will speak only as "representatives" of their group, rather than as individuals with unique needs, interests, talents, and aspirations.

Any doubt in this regard is decisively removed by the Court's decision in *Wygant*. There the government defendants tried to justify their racially preferential scheme by advancing the so-called "role model" theory, under which minority teachers received a layoff preference because they provide a "role model" for minority (and other) students. The "role model" theory is indistinguishable from the Commission's diversity rationale. And Justice Powell's plurality opinion in *Wygant* squarely rejected the role model theory, concluding that any judicial tolerance of the theory "could lead to the very system the Court rejected in *Brown v. Board of Education*." *Wygant*, 476 U.S. at 276.

Since the Commission's diversity theory is even more squarely based on the notion that people think and speak and behave as members of a race rather than as individuals, its acceptance by this Court would pose the same danger. And it will provide others with equally compelling rationales for excluding minorities from juries (at least where they are overrepresented),[27] from working at country and western radio stations (*cf. Beaumont Branch of the NAACP v. FCC*,

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[27] The Court, of course, has ruled that the distinct qualities of different groups may justify *prohibiting* discriminatory exclusion of jurors, but has expressly rejected the notion that any such differences might authorize engaging in such discrimination. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Cf. Duren v. Missouri*, 439 U.S. 357, 371, n. * (1979) (Rehnquist, J., dissenting).

854 F.2d 501, 510 (D.C. Cir. 1988)), and from a host of other endeavors.[28]

In the face of all this, the Commission suggests that it must use race as a surrogate for minority programming because, while the Fifth Amendment does not require it to be color-blind, the First Amendment does indicate that it should be content-blind. *See, e.g., Shurberg*, 876 F.2d at 946 (Wald, J., dissenting). But if it is true that the First Amendment frowns on governmental allocation of the broadcast spectrum on the basis of program content, then the Commission has no legitimate interest in seeking to increase minority programming. Content-based discrimination accomplished through subterfuge offends the First Amendment no less than straightforward content-based discrimination. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936). If, on the other hand, the Commission has authority (as it seems to under current law) to take account of the existence of minority and other programming, it plainly has no "compelling" interest in choosing race instead. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

In sum, all the Commission can point to in support of its racial preferences is one congressional report making conclusionary assertions about "underrepresentation" in the broadcast industry and "other sectors of the economy." As this Court has noted, however if all the

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[28] *See Castaneda v. Partida*, 430 U.S. 482, 504 (1977) (Marshall J.) (rejecting argument that Mexican Americans would not discriminate against fellow group members; "this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups"); *Fullilove*, 448 U.S. at 553 (Stevens, J., dissenting) ("[t]oday there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole."); *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28 (1984) ("In claiming that women might have a different attitude . . . , the Jaycees rely solely on unsupported generalizations about the relative interests and perspectives of men and women . . . . [W]e have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions."); *Smith v. Board of Education*, 365 F.2d 770, 782 (1966) (per Blackmun, J.) ("In this day, race *per se* is an impermissible criterion for judging either an applicant's qualifications or the district's needs. This applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with [people] when these descriptions amount only to euphemistic references to actual or assumed racial distinctions.").

Commission "need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection clause will in effect have been rendered a nullity." *Croson*, 109 S. Ct. at 727.

C. The Commission's Policy Is Not Narrowly Tailored.

Since the Commission is pursuing illegitimate goals, we will only briefly point out the overbroad and haphazard nature of the means by which they seek to accomplish them.[29]

First, race-neutral alternatives, such as examining minority *programming*, are not only available but would undoubtedly *better* serve the Commission's desire to diversify programming and enhance minority participation. *See Croson*, 109 S. Ct. at 728-730. Second, the Commission's failure to engage in an individualized, case-by-case determination concerning an applicant's programming plans or status as a victim of invidious discrimination is particularly egregious because the Commission already holds an extensive comparative hearing in which many aspects of the applicant's background and aspirations are explored. "In such circumstances, not even an administrative-convenience rationale exists to justify operating by generalization or proxy." *Orr v. Orr*, 440 U.S. at 268. *See also Croson*, 109 S. Ct. at 729 ("The interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.").

Nor is there merit in the suggestion by the court below that the Commission's discriminatory policy is somehow sufficiently "flexible" because other factors are considered along with race. *Winter Park*, 873 F.2d at 354. It is quite possible for a racial "plus" to subordinate merit just as effectively as a quota. Such is the case here. The racial and ethnic preference applies in *every* case and will apparently do so either in perpetuity or at least until national proportional representation is achieved for all racial groups. *Id.* at 363. Thus,

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[29] As the Court noted in *Croson*, "it is almost impossible to assess whether the [racial preference] is narrowly tailored to remedy prior discrimination [if] it is not linked to identified discrimination in any way." *Croson*, 109 S. Ct. at 728. Accepting more diffuse, open-ended purposes as sufficiently "compelling" interests would thus drain the requirement of narrow tailoring of any significance.

the Commission's scheme is in essence a 100% quota with possible exceptions made when no minority is interested or possesses the basic qualifications. Moreover, race is balanced against very few other factors, all of which are apparently less important, except for local residency. *Winter Park*, 873 F.2d at 350.

Perhaps more important, the opening up of a new television station in one's community is an extraordinarily rare event; the loss of a license contest therefore works a severe hardship. Moreover, if the opportunity arises in a different location, the nonminority applicant will lose his local preference points, thus virtually guaranteeing that he will lose out to any minority applicant. *See Shurberg*, 876 F.2d at 917. Thus, the loss of this once-in-a-lifetime opportunity is at least as serious as being denied an entry level job in "a particularly specialized area of employment [which can] have the same pernicious effect as the layoff goal in *Wygant*." *Local 28*, 478 U.S. at 488 (Powell, J., concurring).[30]

[30] Thus, the suggestion by the dissenting opinion in *Shurberg* that no "settled expectations" are unduly disrupted by a license denial is particularly puzzling. *Id.* at 951. Petitioner's expectations here were disrupted far more seriously than those of the contractors in Richmond, who could work in the private sector or other towns, and more than Alan Bakke, who could attend medical school somewhere else. In any event, the entire concept of settled expectations is fundamentally misguided because it confuses the requirements of the Due Process Clause with those of the Equal Protection Clause. The latter provision forbids racial discrimination in *all* government programs, regardless of whether the discriminatee had an expectation or "entitlement" to the benefit denied. While no one has an absolute entitlement to a job or benefit, all have an expectation of, and entitlement to, equal treatment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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No. 89-453

IN THE

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding preferences in comparative broadcast licensing proceedings to certain applicants on the basis of their owners' minority status violates the equal protection component of the Fifth Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,

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Respondents.

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for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more than 120,000 members throughout the United States. WLF engages in litigation in matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

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[1]Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of this Court.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination. In its pursuit of its view that the Constitution and the civil rights laws protect all citizens against discrimination, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See, e.g., City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

This brief will bring relevant matter to the attention of the Court that will not be brought to the attention of the Court by other parties because of the unique perspective of WLF in its commitment to a free market where individuals can compete without suffering from intentional discrimination because of the color of their skin.

STATEMENT

1. The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* (1982) ("Communications Act"), requires the Federal Communications Commission ("FCC") to advance the "public convenience, interest, or necessity" in comparative licensing proceedings. *Id.*, § 307(a); *see also* § 309(a). To fulfill that mandate, the FCC has structured its comparative review process to achieve both the "best practicable service to the public" and "a maximum diffusion of control of the media of mass communications." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965) ("1965 Policy Statement"). In these comparative proceedings, the FCC has traditionally engaged in both a "quantitative" and "qualitative" analysis of competing applicants for broadcast licenses (Pet. App. 4a). The quantitative analysis focuses on each applicant's proportional integration of ownership into management

(*id.*); the qualitative analysis focuses on each applicant's "experience, background, and knowledge of the community" (*see TV 9, Inc. v. FCC*, 495 F.2d 929, 936 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) (citation omitted)).

Prior to 1973, the FCC did not consider race-based factors in its comparative licensing proceedings. *See TV 9, Inc. v. FCC*, 495 F.2d at 936. In *TV 9*, however, the United States Court of Appeals for the District of Columbia Circuit rejected the FCC's position that "the Communications Act, like the Constitution, is color blind." *Id.* The court thus concluded that, "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" to a minority-owned applicant in the comparative licensing process. *Id.* at 938. Two years later, the court of appeals rejected the FCC's decision to accord such preferences to minority applicants only where the applicants proved a nexus between race and program diversity, concluding that the integration of minorities into station management *presumptively* promotes that diversity. *See Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975).

In response, the FCC modified its policy to require consideration of the degree of minority ownership, among other factors, at the qualitative stage of the comparative licensing process (Pet. App. 4a). Pursuant to that policy, the FCC began to award preferences to applicants to the extent that certain "minorities," including Blacks, individuals with Hispanic surnames, American Eskimos, Aleuts, American Indians, and Asian-Americans, held ownership interests in the potential licensees. *See Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 2d 978, 980 n.8 (1978). The FCC adhered to its new policy over the next decade. Indeed, in 1982, Congress passed the Communication Amendments Act of 1982, Pub. L. No.

97-259, 96 Stat. 1087 (1982) ("1982 Amendment"), which accorded the FCC the discretion to use a lottery system in lieu of its traditional comparative hearing process, and mandated that the FCC incorporate a similar minority preference into that lottery system, if adopted. *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 41 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2237, 2285 (pointing to *TV 9* as a "landmark case").

In 1986, however, the FCC initiated a nonadjudicatory proceeding to examine whether its racial preference policies violate the equal protection standards of the Constitution. *See Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd. 1315 (1986) ("Reexamination"). Before the FCC could conclude its Reexamination, however, Congress passed a continuing resolution that precluded the FCC from using any congressionally-appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of, [its] policies . . . to expand minority and women ownership of broadcasting licenses. . . , other than to close [the Reexamination] with a reinstatement of prior policy. . . ." Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987) ("1988 Appropriations Act"). On January 14, 1988, therefore, the FCC terminated its Reexamination and reinstated its policy of according racial preferences in comparative licensing proceedings (Pet. App. 51a).[2]

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[2]In two subsequent appropriations bills, Congress restated its ban on the FCC's use of appropriated funds to examine this policy. *See* Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice (continued...)

2. In 1982, Petitioner, Metro Broadcasting Inc. ("Metro"), filed an application for a license to use a new television channel that the FCC had assigned to the City of Orlando, Florida (Pet. App. 2a-3a, 65a). Because two other companies -- Winter Park Communications ("Winter Park") and Rainbow Broadcasting Company ("Rainbow") -- filed competing applications for the same license, an administrative law judge ("ALJ") of the FCC conducted a comparative hearing to evaluate the three applicants (*id.* at 3a, 65a). At the outset, the ALJ disqualified Rainbow for a "lack of candor" in its application (*id.* at 66a). He then awarded the license to Metro because, in his view, Metro had a quantitative advantage over Winter Park that, coupled with its qualitative enhancements, made Metro the "overwhelming comparative winner" (*id.*).

The FCC's Review Board reversed the ALJ's decision to disqualify Rainbow and to award the license to Metro (Pet. App. 66a). In considering all three applicants from a quantitative perspective, the Board concluded (1) that Winter Park was clearly inferior to both Metro and Rainbow, and (2) that Rainbow had a slight quantitative advantage over Metro based on the degree of ownership integration with management (*id.* at 86a-87a). It then credited Rainbow, which had 90 percent minority ownership participation, with a qualitative advantage over Metro, which had only 19.8 percent minority ownership (*id.* at 87a). It thus concluded that, "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage and solid broadcast experience preference, somewhat outweighs Metro's local residence

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[2](...continued)
and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

and civic participation advantage" (*id.* at 88a). For these reasons, the Board awarded the license to Rainbow (*id.* at 90a). On October 18, 1985, the FCC declined to review the Board's decision (*id.* at 62a).

3. Winter Park and Metro appealed, arguing principally that the FCC's minority preference policy violates the equal protection component of the Constitution (Pet. App. 2a). Before the court of appeals could address the case, however, the FCC initiated its own Reexamination of the constitutionality of its minority preference policy (*id.* at 49a). The court thus remanded the case for a determination whether the minority preference was "of decisional significance" to the issuance of the license to Rainbow (*id.* at 49a, 58a-59a).

On remand, in March 1987, the FCC concluded that the "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro" (Pet. App. 57a). The FCC initially decided to hold the case in abeyance until the completion of its Reexamination (*id.*). But, in February 1988, after Congress "defunded" its Reexamination in the 1988 Appropriations Act, the FCC reinstated its earlier order upholding the Review Board's decision to award the license to Rainbow (*id.* at 50a-51a).

4. The court of appeals then reinstated the appeal and, in a 2-1 decision, affirmed the FCC's decision. The majority concluded (Pet. App. 10a) that "the legality of the FCC's use of a qualitative enhancement for minority ownership is easily resolved" on the basis of the court of appeals' prior decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The majority noted that, in *West Michigan*, the court had concluded that the FCC's minority preference policy "easily passe[d] constitutional muster" because (1) the policy required consideration of minority ownership as

only one factor in a multi-factor comparative proceeding, and (2) Congress had endorsed this "remedial measure" in its 1982 Amendment (Pet. App. 10a-11a, quoting *West Michigan*, 735 F.2d at 613-14).

The majority further concluded that none of this Court's recent decisions "has undermined the holding in *West Michigan*" (Pet. App. 11a-12a). The majority found that the Court's decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), did not "repudiate[]" its two earlier decisions on which the court of appeals in *West Michigan* had relied (Pet. App. 12a); that a majority of the Justices in *Croson* continued to view *Fullilove v. Klutznick*, 448 U.S. 448 (1980), as "good law" (Pet. App. 12a); and that none of the opinions in *Croson* disgreed with Justice Powell's conclusion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that "racial diversity [is] a constitutionally permissible goal, independent of any attempt to remedy past discrimination" (Pet. App. 13a). Finally, the majority determined that the FCC's racial preference policy "is more similar to the *Fullilove* program found constitutional than to the *Richmond* plan" (*id.*), reasoning that the FCC policy considered minority ownership as only one of several factors in the comparative review process (*id.* at 13a-14a), and had "Congress' express approval" in both the 1982 Amendment and the 1988 Appropriations Act (*id.* at 14a-15a).

Judge Williams dissented from the majority's constitutional analysis. He found that this Court's decisions in *Croson* and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), had "largely undermined" the court of appeals' decision in *West Michigan* (Pet. App. 18a). In his view, the FCC's "non-remedial" purpose for its minority preference policy -- *i.e.*, fostering diversity in programming -- is not a justification that survives strict scrutiny under the *Croson* Court's equal protection analysis (*id.*). He

likewise questioned whether Rainbow's asserted purpose for the FCC's racial preference policy -- *i.e.*, remedying lingering effects of prior discrimination against minorities -- could survive strict scrutiny analysis (*id.* at 30a). He found that it was "highly doubtful" that Congress, in its appropriations bills, had clearly mandated such a remedial program (*id.* at 30a-31a), and that Congress' 1982 "finding" of minority underrepresentation in broadcasting was an uncertain predicate for a race-based program (*id.* at 39a-42a). Finally, he found that the FCC's policy, in any event, was not "narrowly tailored" to achieve these goals (*id.* at 43a-45a).

SUMMARY OF ARGUMENT

A. The FCC's minority preference policy, which makes distinctions among applicants for broadcast licenses on the basis of race, is constitutionally suspect. A majority of this Court has recently confirmed that, to survive an equal protection challenge, such a race-based classification must withstand strict scrutiny: it must be "narrowly tailored" to achieve a "compelling" governmental interest. Nothing in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), supports the application of a different standard in this case. To the contrary, the race-based action of a federal administrative agency that lacks both Congress' unique law-making authority and an unambiguous congressional mandate to adopt race-conscious remedies -- like the FCC -- demands the strictest of judicial scrutiny.

B. Neither of the asserted purposes for the FCC's race-based policy is sufficiently compelling to justify a racial preference. This Court has suggested that only "remedial" purposes, *i.e.*, those designed to remedy the effects of identifiable discrimination, constitute compelling governmental purposes. The FCC's diversity rationale, which rests on the notion that increased

minority representation in broadcasting will promote programming diversity, does not meet this standard. Moreover, Justice Powell's separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), does not support the FCC's effort to establish a proper non-remedial predicate for its program. A university's First Amendment *right* to assemble a diverse student body, which Justice Powell relied on in *Bakke*, is distinct from the FCC's First Amendment-related *goal* of promoting diversity in programming. Indeed, using race-based means of achieving the FCC's diversity goal tends only to reinforce racial stereotyping.

Congress has not, moreover, provided a remedial justification for the FCC's minority preference scheme. The texts of neither the 1982 Amendment to the Communications Act nor the recent appropriations bills reference such a purpose. Nor does Congress' reference in legislative history to the underrepresentation of minorities in broadcasting provide the necessary remedial justification. Congress linked that "underrepresentation" to no particularized discrimination by either the FCC or the broadcasting industry. To conclude that Congress provided a remedial purpose for the FCC's policy, in the absence of any affirmative evidence of discrimination, would be to allow Congress to dictate impermissible racial balancing.

C. Even if "compelling" governmental interests are found to underlie the FCC's policy, it would still fail for a lack of "narrow tailoring." The FCC's race-based policy is completely unnecessary to promote diversity in programming because market forces have already achieved that goal. The FCC, moreover, has not attempted to address any problems of low minority participation in broadcasting with race-neutral means; limit the policy's duration to account for the achievement of its goals; or minimize the burden that the policy places on non-minority applicants who

compete for scarce broadcast licenses. The FCC's policy cannot, therefore, survive strict scrutiny review.

ARGUMENT

THE FCC'S POLICY OF AWARDING PREFERENCES IN COMPARATIVE BROADCAST LICENSING PROCEEDINGS TO CERTAIN APPLICANTS ON THE BASIS OF THEIR OWNERS' MINORITY STATUS VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Nonetheless, the FCC makes distinctions among applicants in comparative broadcast licensing proceedings on the basis of race. Under this Court's "strict scrutiny" analysis, the FCC's minority preference policy can survive equal protection challenge only if it serves a "compelling" governmental interest and is "narrowly tailored" to achieve that goal. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721 (1989) (reaffirming standard of review expressed by plurality in *Wygant*). The FCC's policy cannot survive such strict judicial scrutiny.

A. Governmental Classifications On The Basis Of Race Are Constitutionally Suspect And Subject To Strict Judicial Scrutiny

1. We begin by explaining the standard of judicial review applicable to this case. The Court has long

recognized that racial classifications inevitably "carry a danger of stigmatic harm." *Croson*, 109 S. Ct. at 721. Contrary to the constitutional concept of equality, they tend to reinforce unfounded racial stereotypes and "promote notions of racial inferiority." *Id.* And they infringe upon an individual's constitutionally protected "'personal right[]' to be treated with equal dignity and respect" under the law. *Id.* Accordingly, a majority of this Court has recently confirmed that all race-based decision criteria must withstand "strict scrutiny" to survive equal protection review. *Croson*, 109 S. Ct. at 721 (Part III-A); *id.* at 735 (Scalia, J., concurring); *see also id.* at 752 (Marshall, J., dissenting) (noting majority's adoption of strict scrutiny standard).

Under this standard, an official race-based classification, like the FCC's minority preference policy in this case, cannot pass constitutional muster unless the government's goal is "compelling" and the means selected are "narrowly tailored" to the fulfillment of that goal. *Wygant*, 476 U.S. at 274; *see Croson*, 109 S. Ct. at 721-22. The purpose of this strict scrutiny of racial classifications is clear: "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool . . . [and to] ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721.

2. The court below failed to subject the FCC's minority preference policy to this strict judicial scrutiny. Instead, the majority held (Pet. App. 14a) that the FCC's race-based policy easily passed constitutional muster under the standards set forth in Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). It is unclear whether Chief Justice Burger's opinion in *Fullilove* enjoys the support of a majority of

the Court.[3] But, in all events, nothing in his *Fullilove* opinion justifies something less than "strict scrutiny" of a race-based policy of a federal administrative agency that possesses neither (a) Congress' unique law-making authority nor (b) an unambiguous congressional mandate to adopt race-conscious remedies.

a. In *Fullilove*, the Court upheld against equal protection challenge a congressionally-established 10 percent minority set-aside program applicable to federal grants for state and local public works projects. In his opinion for a plurality, however, "Chief Justice Burger did not employ 'strict scrutiny' or any other traditional standard of equal protection review." *Croson*, 109 S. Ct. at 717; *see Fullilove*, 448 U.S. at 492. Rather, although he noted that race classifications require "close examination" (*id.* at 472), Chief Justice Burger chose to accord "appropriate deference to the Congress, a co-equal branch" (*id.*), because it had established the set-aside remedy pursuant to its "specific constitutional mandate to enforce the dictates of the Fourteenth

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[3]Both Chief Justice Rehnquist and Justice Stevens dissented in *Fullilove*. *See* 448 U.S. at 522-32 (Stewart, Rehnquist, JJ., dissenting); *id.* at 532-54 (Stevens, J., dissenting). Justice Scalia, though declining to revisit *Fullilove*, suggested in *Croson* that he did not accord much weight to any of the three opinions supporting the *Fullilove* judgment. *Croson*, 109 S. Ct. at 736 (Scalia, J., concurring). Justice Kennedy refused in *Croson* to join in the part of the opinion that hinted at continuing support for the *Fullilove* opinion. *See* 109 S. Ct. at 734 (Kennedy, J., concurring). Finally, while Justices White and O'Connor in *Croson*, 109 S. Ct. at 717-20, suggested that Chief Justice Burger's *Fullilove* opinion had continuing authority, they also indicated that only one standard of review should apply in equal protection cases. *Id.* at 721-22; *Wygant*, 476 U.S. 285-86 (O'Connor, J., concurring). Thus, there is reason to believe that a majority of the Court now agrees with Justice Powell that congressional acts should not be subject to a distinct standard of judicial review. *See Fullilove*, 448 U.S. at 496 (Powell, J., concurring); *cf. Bakke*, 438 U.S. at 299 (plurality opinion).

Amendment." *Croson*, 109 S. Ct. at 719. In so doing, Chief Justice Burger emphasized that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483.

It would be inappropiate to apply a similarly deferential analysis to the constitutionally-suspect policy of a federal administrative agency. An administrative agency lacks Congress' unique law-making authority. While an administrative agency may implement congressional acts through rulemaking, that authority is plainly distinct, as this Court has recognized, from Congress' constitutional power to make law. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (Court assumed, without deciding, that Congress and the President had the authority to promulgate a law barring noncitizens from certain federal employment opportunities, but held that the Civil Service Commission did not have such authority); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law"). The power to make law resides exclusively with the duly-elected members of Congress who, through the legislative process, must engage in open debate and politically-accountable decision-making. Thus, while there may arguably be reason to subject the race-conscious actions of Congress to something less than "strict scrutiny" review, there is no reason to apply any lesser standard of review to the race-conscious actions of the FCC -- a federal agency that lacks both the inherent law-making authority and the political accountability of Congress. *See Note, The Constitutionality of Affirmative Action in Public*

Employment: Judicial Deference To Certain Politically Responsible Bodies, 67 Va. L. Rev. 1235, 1245 (1981).[4]

That federal administrative agencies, unlike Congress, possess no unique power under the Fourteenth Amendment to legislate race-based remedies only underscores the need to subject their race-conscious actions to the strictest of scrutiny. In *Fullilove*, Chief Justice Burger relied on Congress' unique powers under Section 5 of the Fourteenth Amendment to justify giving deference to Congress. The plurality opinion in *Croson* did too. But the FCC has no such unique powers and, as Justice O'Connor has explained in considering the analogous power under the Fifteenth Amendment, "[t]he breadth of authority granted to Congress under the enabling provision of the Fifteenth Amendment is not equivalent to the amount of discretion that an administrative agency possesses in implementing the provisions of a federal statute. An administrative agency is itself a creature of statute." *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 613-14 (1983) (O'Connor, J., concurring). Thus, the FCC is plainly not entitled to any special deference here.

b. Of course, had the FCC promulgated its minority preference policy in response to "'the affirmative intention of the Congress clearly expressed'"

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[4]As this Court aptly noted in *Greene v. McElroy*, 360 U.S. 474, 507 (1959):

> [E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

(*NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988)), the FCC could perhaps argue that this Court should subject its minority preference policy to a less searching standard of review. It is doubtful that such an argument could withstand the opinions of this Court, which now recognize that all race-conscious policies are subject to strict scrutiny. *See Croson*, 109 S. Ct. at 721 (Part III-A); *id.* at 735 (Scalia, J., concurring); *see also Wygant*, 476 U.S. at 273-74. But the Court need not resolve this question because the FCC lacks the unambiguous congressional mandate necessary to support such an argument.

Congress has directed the FCC in comparative licensing proceedings only to follow the "public convenience, interest, or necessity" standard (47 U.S.C. § 307(a); *see also* 47 U.S.C. § 309(a)). While this mandate is "expansive" (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969)), it does not constitute a "clearly expressed" grant of authority to legislate race-conscious remedies. *See Community Television v. Gottfried*, 459 U.S. 498, 509 n. 14 (1983) (Court held that the "general words 'public interest'" did not mandate that FCC enforce the Rehabilitation Act of 1973); *NAACP v. FPC*, 425 U.S. 662, 670 (1976) ("the use of words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination"). *Cf. Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989), *quoting Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) ("[W]e will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute'"); *Hoffman v. Conn. Dept. of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (same). Indeed, in its original 1965 Policy Statement, the FCC recognized, contrary to its claim today, that its "public interest" mandate required "color blind" selec-

tion criteria in comparative licensing proceedings. *See Mid-Florida Television Corp.*, 33 F.C.C. 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 F.C.C. 2d 559 (1972), *rev'd, TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). To now suggest that Congress, in enacting the Communications Act, unambiguously mandated the FCC's adoption of race-conscious policies is thus completely untenable.

None of Congress' subsequent legislative actions, moreover, has codified the challenged minority preference policy or elevated that policy to the status of a congressional enactment. To be sure, in the 1982 Amendment and the recent appropriations bills, Congress manifested some support for a minority preference policy by the FCC. But the 1982 Amendment merely requires the FCC to utilize minority preferences *if* it selects broadcast licensees through a lottery system. And the appropriations bills only "order a kind of mental standstill" (Pet. App. 35a), by prohibiting the FCC from using allocated funds to reexamine its minority preference policies. These manifestations simply do not constitute unambiguous, affirmative legislation mandating race-conscious remedies in the FCC's comparative licensing proceedings. *Compare Fullilove*, 448 U.S. at 468 (noting that Congress made the critical judgments) *and Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16-18 (1981) (noting that the Court will not infer congressional intent to impose an affirmative Fourteenth Amendment obligation on the states unless Congress does so "unambiguously"); *see also TVA v. Hill*, 437 U.S. 153, 190 (1978) (recognizing that appropriations measures normally do not command the same authoritative weight as "substantive enactments" because they "have the limited and specific purpose of providing funds for authorized programs"); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 843 n.6 (1982); *National Treasury Employees*

Union v. Devine, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984).

On the contrary, the 1982 Amendments and the appropriations bills do not change the fundamental character of the FCC's policy as an administrative, rather than congressional, act. It is undeniable that the FCC adopted its race-based policy in the 1970s -- before either the 1982 Amendment or the appropriations bills -- in the absence of any explicit congressional mandate to do so. And it is likewise undeniable that the FCC adopted that administrative policy without the type of legislative fact-finding and deliberation that Congress, had it legislated such a race-based policy in the first instance, would have been bound to follow. *See Fullilove*, 448 U.S. at 490; *id.* 503-06, 511-13 (Powell, J., concurring); *see generally* Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference To Certain Politically Responsible Bodies*, 67 Va. L. Rev. at 1247. This administrative policy must be subject to the strictest of judicial review.

B. The FCC's Minority Preference Policy Cannot Survive Strict Scrutiny Because It Serves No Compelling Governmental Purpose

Because the court below applied the wrong standard of review, it failed to determine whether the FCC's minority preference policy serves a sufficiently "compelling" governmental interest to justify a racial classification. The FCC, however, claims that its policy is necessary to enhance program diversity (*id.* at 19a). Rainbow, on the other hand, asserts that the FCC's policy is necessary to cure the effects of past discrimination against minorities in the broadcasting industry (*id.* at 18a). Neither justification can survive strict scrutiny review.

1. The FCC's diversity rationale rests on the notion that increased *minority ownership* in broadcasting, achieved through racial preferences in the licensing process, will promote diversity in *programming*. It is unclear whether this governmental objective -- *i.e.*, promoting diversity in programming -- is even constitutionally legitimate.[5] In all events, it is quite clear that

[5]The objective assumes that the FCC can lawfully regulate the content of speech. Government generally may not attempt to do so. *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972); *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 8 (1986). To be sure, this Court has held that, because of the scarcity of available broadcast frequencies, the FCC can regulate the content of speech to some degree. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). But the Court has also held that the FCC may only impose content-based restrictions that are "narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984). The FCC's efforts to promote programming diversity may now fail this test.

In initially sustaining limited FCC regulation of the content of speech, the Court presumed that such regulation was necessary to ensure public access to viewpoint diversity. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. The FCC has now determined that the interest of the public in viewpoint diversity is fully served by market forces. *See Deregulation of Radio*, 84 F.C.C. 2d 968, 978, *reconsid. denied*, 87 F.C.C. 2d 797 (1981), *aff'd in relevant part, Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983). Thus, the goal of government-controlled program diversity may now be insufficiently substantial to survive First Amendment scrutiny (much less equal protection scrutiny). *See Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. 5043, 5052 (1987) (In retracting the Fairness Doctrine, FCC noted that, "[b]ecause [it] imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest"), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied* 1990 U.S. LEXIS 38 (1990).

this governmental interest is not sufficiently "compelling" to justify a racial preference.

a. No opinion of the Court has explicitly delineated the class of governmental interests that are sufficiently "compelling" to justify a racial classification. A majority of the Court has recently suggested, however, that such classifications must be "strictly reserved for remedial settings." *Croson*, 109 S. Ct. at 721 (Opinion of O'Connor, J.); *id.* at 736, 737-38 (Opinion of Scalia, J.); *see also id.* at 730 (Opinion of Stevens, J.) (disagreeing with the premise that "seems to underlie today's decision, as well as the decision in *Wygant v. Jackson Board of Education*, that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong") (citation omitted). That suggestion is, with perhaps one exception,[6] fundamentally sound constitutional law, and requires rejection of the FCC's programming diversity rationale in this case.

"Classifications based on race carry a danger of stigmatic harm." *Croson*, 109 S. Ct. at 721. "[T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* For these reasons, a majority of the Justices in *Croson* quite properly concluded that racial classifications must be limited to situations in which there are findings of prior, identified unlawful discrimination. *See id.* at 721-23,

[6]The single exception concerns instances in which a social emergency rising to the level of imminent danger to life and limb, or to national security, exists. *See Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, Stewart, J., concurring). A similar exception exists in First Amendment doctrine. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (exception for "inciting or producing imminent lawless action").

727-28, 730 (Opinion of O'Connor, J.); *id.* at 735-38 (Opinion of Scalia, J.).

As Justice Powell has explained, "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Bakke*, 438 U.S. at 307. "Without such findings of constitutional or statutory violations," however, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another" on the basis of race. *Id.* at 308-09. To hold otherwise would allow government to engage in race-based social engineering, contrary to the most fundamental purposes of the equal protection component of our Constitution. *Id.* at 310; *see also Croson*, 109 S. Ct. at 721 (Opinion of O'Connor, J.); *id.* at 735-738 (Opinion of Scalia, J.).

b. Relying on Justice Powell's opinion in *Bakke*, however, the FCC contends that "programming diversity" is a sufficiently compelling governmental interest to justify a racial preference. Of course, given Justice Powell's opinion for the plurality in *Wygant*, it is entirely unclear whether Justice Powell continued after *Bakke* strongly to hold the view that "diversity" concerns may justify a racial preference; and, as explained above, the opinions in *Croson* suggest that there is not a majority among the current Justices to subscribe to any such "diversity" rationale. In all events, the "diversity" rationale to which Justice Powell subscribed in *Bakke* provides no support for the FCC's diversity rationale in this case.

In *Bakke*, Justice Powell found the "attainment of a diverse student body [to be] a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12. But he did so because of the important place that "academic freedom" occupies under the First

Amendment. That constitutionally-favored freedom, according to Justice Powell, required that equal protection guarantees have sufficient bend to allow a university to select a student body that it believed would create "[t]he atmosphere of 'speculation, experiment and creation' . . . so essential to the quality of higher education." *Id.* at 312.

A university's constitutionally-protected interest in maintaining a diverse student body, however, is quite distinct from the FCC's interest in diversity in broadcast programming. In promoting programming diversity, the FCC is not itself engaging in any speech and has no constitutionally-protected speech interest. While the FCC's diversity interest may have support in the "First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources'" (*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)), it is at bottom only a legislative and administrative *goal*, and not a First Amendment *right* (as is an educational institution's First Amendment *right* to assemble a diverse student body). Thus, while a university may have a "contervailing" (*Bakke*, 438 U.S. at 313) First Amendment interest sufficient to allow it a limited right to consider applicants on the basis of their minority status, the FCC has no countervailing constitutional right that justifies treating its interest in programming diversity as sufficiently compelling to allow a racial classification.

That the FCC's interest in diversity of programming is not sufficiently "compelling" to justify a constitutionally-suspect racial classification is, in fact, evident from Justice Powell's opinion in *Bakke*. Justice Powell's opinion listed four distinct purposes that the racial preference at issue in that case might have served. *See* 438 U.S. at 305-06. The third of these

purposes was the alleged governmental interest in increasing the number of doctors who would serve minority communities. *Id.* at 310-11. Justice Powell agreed with the state court below that minority medical school graduates might be more likely to practice in minority communities than the average white medical school graduate would (*id.* at 310-11) -- just, as here, the FCC suggests that a minority broadcaster might, arguably, be more likely to program for minority audiences than would a typical white broadcaster. But Justice Powell also agreed with the lower court that there were "more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race." *Id.* at 311 (citation omitted). So, too, the Court should conclude here that the FCC's goal of increasing minority-responsive programming is not sufficiently compelling to justify the racial stereotype upon which the FCC's minority preference is based.

Racial classifications that promote the achievement of diverse student bodies are arguably less invidious than other such classifications because, as the dissent in this case noted (Pet. App. 21a), "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are." Diverse broadcast station ownership, on the other hand, does not have a similar effect; listeners and viewers cannot see the ethnicity of various licensees' owners. Thus, the FCC's minority preference policy only reinforces, rather than erases, racial stereotypes: it is based on the presumption that minority owners will produce minority programming fit for a minority audience -- which is precisely the type of impermissible stereotyping that this Court has rejected as inconsistent with fundamental equal protection principles. *See Croson*, 109 S. Ct. at 721; *id.* at 730-34 (Stevens, J., concurring); *id.* at 735, 739 (Scalia, J., concurring).

2. Although the FCC has expressly renounced any remedial rationale for its minority preference policy (*see* Pet. App. 33a), Rainbow argues that Congress has provided the requisite remedial justification for the policy (*id.* at 18a). Congress' legislative actions with respect to the FCC's minority preference policy, however, fall far short of providing that remedial justification.[7]

Congress did not include a remedial rationale for the FCC's minority preference scheme in the text of either the 1982 Amendment or the subsequent appropriations bills. The 1982 Amendment only mentions the FCC's non-remedial "diversity" goal; it provides that the FCC, if it adopts a lottery system, must grant "significant preferences" to minority applicants if doing so "would increase the diversification of ownership of the media of mass communications." Pub. L. No. 97-259, 96 Stat. 1087 (1982). The appropriations bills, moreover, do not contain *any* rationale for their prohibition on the use of appropriated funds to reexamine the FCC's minority preference policy. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989). In short, based on their express terms, these enactments provide no remedial purpose for the policy.

The legislative history provides no further basis for believing that Congress had a remedial purpose in

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[7]Although Rainbow's precise position before this Court is unclear, it suggests that "underrepresentation" of minorities in broadcasting, alone, might justify the FCC's policy (Opp. Cert. 8, 10). Of course, if the FCC's policy serves to advance proportionate representation of minorities in broadcasting, it would be impermissible as "discrimination for its own sake." *Bakke*, 448 U.S. at 307. We assume, therefore, as the dissent below does, that Rainbow instead seeks to justify the FCC's policy as a remedy for past discrimination.

enacting these laws. The only arguably relevant comment appears in the Conference Report to the 1982 Amendment, where the conferees stated:

> [T]he effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2287. The conferees, however, never linked this "severe underrepresentation" either to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry. Thus, it cannot suffice as evidence of a remedial purpose -- for to accept such unconnected "societal discrimination" as evidence of a remedial purpose would effectively allow Congress to impose race-conscious remedies at any time and in any circumstance. *See Croson*, 109 S. Ct. at 722-28.

Fullilove is not to the contrary. In *Fullilove*, the plurality was convinced that Congress was attempting to remedy an underrepresentation in minority contractors specifically attributable to past discrimination in public contracting opportunities. *See* 448 U.S. at 477-78 (Opinion of Burger, C.J.); *id.* at 497-98, 503 (Opinion of Powell, J.). Here, by contrast, Congress has not purported to find any such discrimination in the broadcast licensing field. Indeed, the FCC has explicitly disclaimed that any such discrimination can be found. *See* FCC Br. on Rehearing En Banc at 18, *Steele v. FCC*, 806 F.2d 1126 (D.C. Cir. 1986).

Justice Powell's opinion in *Fullilove* thus makes clear that, even if the legislative history of the 1982 Amendment can properly be read as asserting a remedial purpose, the FCC's minority preference policy still could not stand. Just as Justice O'Connor's opinion in *Croson* makes clear that a state "cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists" (109 S. Ct. at 725), so too does Justice Powell's opinion in *Fullilove* make clear that a congressional finding of past discrimination must be "reasonable" and justified by "affirmative evidence." *Fullilove*, 448 U.S. at 503-04 n.4 (Powell, J., concurring); *see also id.* at 502-06 & n.8. Here, there is absolutely no evidence of prior discrimination in the issuance of broadcast licenses or against would-be minority broadcasters. Accordingly, any asserted remedial purpose would be unreasonable and more properly viewed as a pretext for attempted racial balancing.

C. The FCC's Minority Preference Policy Is Not A Narrowly-Tailored Means Of Ensuring Diverse Programming Or Redressing Past Discrimination

The court below also failed to conduct the second inquiry under the Court's equal protection analysis: whether the FCC's minority preference policy is "narrowly tailored" to achieve either the FCC's diversity goal or Rainbow's remedial goal. This Court has made clear that a number of factors are relevant to determining whether a remedy is narrowly tailored: the necessity for race-conscious relief and the efficacy of alternative non-race-based remedies; the availability of meaningful waiver provisions; the planned duration of the remedy; and the effect of the remedy on third persons. *See Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 280 n.6; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Sheet Metal*

Workers v. EEOC, 478 U.S. 421, 475-81 (1986) (plurality opinion). Had the court below considered these factors, it could only have concluded that the policy is not a constitutionally-permissible means of achieving either goal.

The FCC has no basis for suggesting that the minority preference scheme is necessary to achieve programming diversity because that goal has already been attained. The FCC has found that market conditions have already made, and will continue to make, broadcast programming sufficiently diverse. *See Deregulation of Radio*, 84 F.C.C. 2d 968, 978, *reconsid. denied*, 87 F.C.C.2d 797 (1981), *aff'd in relevant part*, *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Indeed, in recently retracting its Fairness Doctrine, the FCC noted the "explosive growth in both the number and types of [information] outlets in every market." *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C. Rcd. at 5051 (citation omitted). It added that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today." *Id.* (quotation omitted). Accordingly, the FCC's intrusion into the market through a race-based classification is completely unnecessary and not properly part of a "narrowly tailored" government program.

The FCC's preference policy also ignores potential non-race-based measures for increasing minority ownership and, so the argument goes, programming diversity. The FCC has determined that the primary barrier to increased minority representation in broadcast ownership is lack of access to capital and credit. *See Strategies for Advancing Minority Ownership in Telecommunications, Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission*, (1982). Therefore, an FCC policy that

provides means-based financing to potential licensees could, without relying on racial criteria, achieve the FCC's desired end of increased minority access and programming. *See Croson*, 109 S. Ct. at 728 ("[i]f MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation"). Moreover, if the FCC's goal is indeed to achieve "optimal diversity" in programming, the FCC could rely on its licensing proceedings to determine, on a case-by-case basis, those individual licensees most likely to add a unique perspective to programming or to serve a distinct sector of the population. *Cf. Bakke*, 438 U.S. at 311. Both of these approaches provide a lawful and non-racial means of attaining diversity in both broadcast ownership and programming.

The FCC's preference policy likewise fails to "fit" Rainbow's stated remedial goal with more precision than any alternative non-race-related means. *See Wygant*, 476 U.S. at 280 n.6, citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n. 26 (1974). Unlike the minority set-aside program upheld in *Fullilove*, which provided for rebuttal of congressional assumptions in the administrative process (448 U.S. at 487), the FCC's preference policy erects an effectively irrebuttable presumption of disadvantage stemming from past societal discrimination. It provides no mechanism for disproving that discrimination has impaired the ability of individual minority broadcasters to obtain a license. The FCC's failure to provide such a mechanism, when its licensing scheme rests on case-by-case determinations, demonstrates that the policy plainly could be

better tailored to achieve its purported goal. *See Croson*, 109 S. Ct. at 728.[8]

Furthermore, the FCC's minority preference policy is not narrowly tailored because it is unlimited in duration. The policy assumes, with respect to its diversity goal, that minority owners have distinct interests and perspectives and will reflect these differences in their programming. But, as the dissent properly concluded (Pet. App. 22a), there is no basis for finding that any nexus between minority *ownership* and minority *programming* even exists. The FCC has been unable to prove or disprove this nexus because Congress has defunded its Reexamination of its licensing preferences. Moreover, Congress' "finding" that such a nexus exists is merely a conclusory and predictive judgment in the legislative history to the 1982 Amendment (*see* Pet. App. 22a-23a, *Shurberg Broadcasting, Inc. v. FCC*, 876 F.2d 902, 923-24 (D.C. Cir. 1989), *cert. granted*, 48 U.S.L.W. 3427 (U.S. Jan. 8, 1990) (No. 89-700)), and a conclusory assertion in the appropriations bills. *See, e.g.*, S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987) ("Diversity of ownership results in diversity of programming and improved service to minority and women audiences"). A Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988), which purports to prove this link, does little to

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[8]That the FCC's preference scheme is not tailored to the goal of redressing past discrimination is facially evident from the provision's applicability to numerous racial and ethnic groups, including Aleuts, American Eskimos, American Indians, Asian Americans, Blacks and Hispanic-surnamed individuals, without any explanation of whether, or in what manner, these groups have suffered identifiable discrimination. *See Wygant*, 476 U.S. at 284 n.13. Indeed, the policy's sweeping scope completely undermines Rainbow's contention that *any* remedial rationale exists for the FCC's preferences.

resolve the debate because, as the dissent below exhaustively explains (Pet. App. 23a-26a), it is defective on both methodological and conceptual grounds.

Even assuming that such a nexus exists, the FCC's purported goal -- to achieve some sort of optimal diversity of programming -- is undefined and seemingly not definable. Thus, neither the FCC nor members of the general public will be able to determine if and when this elusive target is met -- if it has not already been met. *See* discussion, *supra*, at 26. Likewise, absent past findings of identifiable discrimination which would enable the FCC to determine when the effects of that discrimination had been cured, the FCC's policy has a limitless remedial time frame. For similar reasons, this Court has declined to uphold race-based policies, like the FCC's preference policy, that are "timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276.

Finally, the FCC's policy, at bottom, impermissibly places an undue burden on non-minorities. *See Wygant*, 476 U.S. at 283 (plurality struck down a race-conscious layoff provision in part because "layoffs impose the entire burden of achieving racial equality on particular individuals"). The policy deprives applicants, like Metro here, of the unique opportunity to obtain scarce broadcast licenses solely because of the race of their owners; while applicants for employment may have sufficient alternatives to justify treating a denial of a hiring alternative as insubstantial, an applicant for a broadcast license generally has no similar alternatives and suffers a substantial burden (Pet. App. 44a). Such racially-imposed burdens plainly undermine "both the letter and spirit of a constitutional provision whose central command is equality." *Croson*, 109 S. Ct. at 727.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY,

Petitioner,

—v.—

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

METRO BROADCASTING, INC.,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, AND THE NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER IN NO. 89-700 AND IN SUPPORT OF RESPONDENTS IN NO. 89-453

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many of the affirmative action cases decided by the Court during the past fifteen years. Because these cases involve an attempt to promote diversity in the broadcast industry, they have special significance for the ACLU, which has pursued a pluralistic vision of the marketplace of ideas since its founding seventy years ago.

The New York City Commission on Human Rights was established in 1955 to combat discrimination in the City of New York. The Commission enforces New York City's human rights law and seeks to combat the effects of discrimination in the nation's largest city. The Commission has consistently supported narrowly tailored plans designed to remedy the effects of past discrimination.

NOW Legal Defense and Education Fund (NOW LDEF) was established in 1970 by leaders of the National Organization for Women as a separate nonprofit 501(c)(3) organization dedicated to working for equality of opportunity for women and men. NOW LDEF has stressed from the time of its foundation the importance of women's access to and participation in the media. Since 1970, NOW LDEF has petitioned the Federal Communications Commission on many occasions to enhance equal employment opportunities for women

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

and to increase diversity in programming by expanding coverage of issues of concern to women and by diversifying ownership and control of organs of the media.

SUMMARY OF ARGUMENT

The complexity of affirmative action, as a moral and legal issue, is fairly reflected in this Court's fractured decisions addressing the subject. Nevertheless, certain guiding principles have emerged from the nation's struggle to overcome a legacy of discrimination whose consequences are, unfortunately but undeniably, still felt today. First, the Court has upheld narrowly tailored "remedial" plans that undo the effects of past injustice. Second, the Court has recognized that certain key institutions play a critical role in assuring the proper functioning of a democratic society. When those institutions become unrepresentative, for whatever reason, the Court has recognized the "structural" value of affirmative action in correcting the imbalance.

The FCC policies now before the Court can be justified under either model. The congressional findings of past discrimination are both entitled to respect and adequate to support an affirmative action plan. Even absent such findings, however, the desire to promote a diversity of voices within the broadcast industry, given its absolutely critical role as an information source for the American public, can and should be accepted as a compelling state interest.

Largely for that reason, we believe that the minority preference at issue in *Metro Broadcasting* and the distress sale policy at issue in *Astroline Communications* can each be upheld even under strict judicial scrutiny. We also believe, however, that the strict scrutiny standard announced last year in *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), is not the appropriate standard for reviewing affirmative action efforts authorized or

mandated by Congress. First, the text of the Constitution specifically charges Congress with responsibility for implementing the promise of equality contained in the Fourteenth Amendment. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). Second, the size and diversity of the national government minimizes the chances that it will be "captured" by a transient majority interested in unjust self-enrichment. Third, unlike *Croson*, the affirmative action plans now at issue were not adopted by a legislative majority that also qualified as a benefitted group. Under these circumstances, the justification for strict scrutiny articulated in *Carolene Products* may not apply with equal force.

Additionally, we believe that both challenged policies represent narrowly tailored responses by the FCC to the dramatic and documented underrepresentation of women and minorities in the broadcast industry. The minority preference policy is not an inflexible quota that requires the selection of minority applicants for a fixed number of broadcast licenses. Rather, it only applies if the competing applicants are deemed substantially equivalent when judged by other neutral criteria. Similarly, the distress sale policy does not deprive nonminorities of any vested right or settled expectation. Its impact is therefore similar to the affirmative action plans for hiring and promotion that this Court has frequently upheld.

In sum, *amici* respectfully submit that the decision in *Metro Broadcasting* should be affirmed, and the decision in *Astroline Communications* should be reversed.

ARGUMENT

THE FCC AFFIRMATIVE ACTION POLICIES AT ISSUE SHOULD BE UPHELD

A. Narrowly Tailored Affirmative Action Plans Designed To Repair A Damaged Institution Or To Redress The Consequences Of Identifiable Past Discrimination Are Lawful

In the years since the issue was first explicitly considered by this Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the legality of so-called "affirmative action" or "benign" compensatory programs that use race or gender as allocative criteria in an effort to benefit women or members of racial minorities has been discussed on at least twenty occasions.[2]

[2] *Morton v. Mancari*, 417 U.S. 535 (1974)(upholding employment preferences for American Indians in the Bureau of Indian Affairs); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975)(invalidating Social Security benefits confined to widows because purpose was not remedial); *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976) (upholding race-conscious remedies in Title VII cases); *Craig v. Boren*, 429 U.S. 190 (1976)(invalidating gender discrimination in access to 3.2 beer because not based on remedial purpose); *Califano v. Goldfarb*, 430 U.S. 199 (1977)(invalidating presumption of widow dependency because not based on remedial purpose); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)(upholding use of racial criteria in redistricting to enhance likelihood of success of minority candidates); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (protecting rights under *bona fide* seniority systems even when it perpetuates the effects of past racial discrimination); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)(upholding use of minority race as positive admissions criteria, but invalidating fixed racial quota of 16% minority admissions to medical school); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)(upholding under Title VII a voluntarily established race-conscious promotion system designed to remedy the effects of past industry-wide discrimination); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(upholding congressional plan setting aside 10% of government contracts for minority owned enterprises in an effort to (continued...)

Not surprisingly, given the difficult legal and moral issues raised by "benign" discrimination in favor of the targets of past injustice,[3] the Court has experienced diffi-

[2] (...continued)
remedy the consequences of past industry-wide discrimination); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984)(invalidating unauthorized modification of Title VII consent decree to provide for race conscious layoffs in derogation of *bona fide* seniority system); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (invalidating contract by public employer providing for race conscious layoffs in derogation of *bona fide* seniority system); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(upholding consent decree settling Title VII case extending race-conscious hiring and promotion benefits to nonvictims of past discrimination); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding power of Title VII court to order race conscious hiring and promotion to benefit nonvictims of proven racial discrimination); *United States v. Paradise*, 480 U.S. 149 (1987)(upholding judicially imposed racial quota for promotions in order to remedy persistent violations of Title VII); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(upholding under Title VII voluntary plan adopted by public employer that used female gender as a "plus" factor in determining promotions to "traditionally segregated" job categories); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need). *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968).

In addition, *Kahn v. Shevin*, 461 U.S. 351 (1974), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975), are often cited as examples of affirmative action. *Amici* believes, however, that characterization is inapt. *Schlesinger* involved the use of differential rules to reflect actual differences in career ladders faced by men and women in the armed services. It was in no sense a remedial case. *Kahn* involved a purported remedial statute that was, in reality, driven by a stereotypical view of the role of women that was rejected by this Court in *Weinberger*, *supra*, and *Craig v. Boren*, *supra*. The majority's unquestioning acceptance of the existence of a remedial motive in *Kahn* appears at variance with its treatment of sex based distinctions in later cases.

[3] *Compare* A. Bickel, *The Morality of Consent* 133 (1975)("a racial (continued...)

culty in articulating a set of general principles governing affirmative action.[4] However, despite the often fragmented nature of the Court's decisions,[5] *amici* believes that the Court's jurisprudence yields valuable general principles that suggest a constructive path through the legal and moral thicket posed by affirmative action.[6]

In a perfect world, race or gender would almost never be a permissible criterion for the allocation of a valuable benefit.[7] It is, after all, an article of our collective faith that a free market in talent should be the

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[3] (...continued)
quota derogates the human dignity and individuality of all to whom it is applied") with R. Dworkin, *Taking Rights Seriously* 227-29 (1978) (affirmative action is consistent with an individual's right to equal respect and concern).

[4] *See* Choper, "Continued Uncertainty of Remedial Race Classifications: Identifying Pieces of the Puzzle," 72 Iowa L.Rev. (1987).

[5] The Court has considered the constitutionality of affirmative action plans in seven cases. In five of those cases, the Court was unable to issue a majority opinion. *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). Five Justices joined Justice O'Connor's decision for the Court in *Croson* and Justice Douglas' opinion for the Court in *Kahn v. Shevin*.

[6] *Amici* has not attempted to distinguish Title VII cases from constitutional cases in assessing the legality of affirmative action plans for the purposes of this case. It is certainly possible to articulate differing standards under the Equal Protection Clause and Title VII concerning the legality of affirmative action, but this Court has appeared to view the governing standards as indistinguishable.

[7] *E.g. Batson v. Kentucky*, 476 U.S. 79 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). For an example of a rare setting in which race was deemed an appropriate employment criterion, *see Morton v. Mancari*, 417 U.S. 535 (1974).

determinant of an individual's fate. But we do not live in a perfect world. The distribution of wealth and power in our society has been skewed by two undeniable historical facts that have impeded the operation of a true free market in talent. First, racial minorities in the United States have been the target of massive -- and, until relatively recently -- governmentally sanctioned racial discrimination that has severely limited their opportunity to compete fairly for the rewards of a free market in talent.[8] Second, women have been denied the freedom to compete equally with men because a governmentally endorsed ideology confined them to stereotypical roles as wives and mothers, denying many women the opportunity to develop their full human potential.[9]

In the years since the Second World War, our society has succeeded in forging a jurisprudence of fairness that forbids the most explicit forms of race and gender discrimination. But the welcome enunciation of prospective norms of racial and sexual justice has not eliminated the consequences of centuries of discrimination. Women and racial minorities remain radically underrepresented in critical areas of American life. Over the long run, vigorous enforcement of our existing anti-discrimination norms, coupled with adequate educational opportunity, offer our best hope for a color-blind and a gender-blind

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[8] *See e.g., Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1882); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Baldwin v. Frank*, 120 U.S. 687 (1887); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Giles v. Harris*, 189 U.S. 475 (1903); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Korematsu v. United States*, 323 U.S. 214 (1944).

[9] *See e.g., Bradwell v. Illinois*, 83 U.S. 130, 141 (1872)(Bradley J. concurring)("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator"); *Minor v. Happersett*, 88 U.S. 162 (1875); *Goesart v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961).

future. In at least two settings, however, the Court's affirmative action jurisprudence has made clear the legitimacy of hastening the corrective process by favoring members of the underrepresented groups.

First, this Court has upheld the use of race or gender based remedial plans to undo the consequences of identifiable past discrimination.[10] As this Court has recognized, absent race or gender based "remedial" plans, victims would remain uncompensated; wrongdoers would stand uncorrected; and innocent third persons would unintentionally reap the unearned benefits of discrimination as a form of unjust enrichment.[11] Thus, while areas of uncertainty continue to exist as to the nature of the past discrimination that may trigger a remedial plan;[12] the quantum of evidence needed to document the discrimination;[13] the identity of the institution that must certify or acknowledge the discrimination;[14] and the identity of the beneficiaries,[15] the Court's opinions provide significant guidance against which to measure the legality of a "remedial" affirmative action plan. Specifically, once Congress has determined that past discrimination has resulted in an ongoing failure to include women or racial minorities in a desirable economic setting, narrowly tailored "remedial" efforts to increase their future participation have been deemed lawful. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, where historic patterns of discrimination have resulted in the absence of women and racial minorities from significant American institutions whose proper functioning is impeded by the resulting imbalance, this Court has recognized a "structural" need to repair the damaged institution through the use of race or sex as an allocative criteria. For example, in *Morton v. Mancari*, 417 U.S. 535 (1974), a unanimous Court upheld the constitutionality of employment preferences for American Indians in the Bureau of Indian Affairs because the preferences were necessary to permit the Bureau to carry out its mission of enhancing Indian self-government. Similarly, in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), the Court upheld an explicit racial gerrymander under the Voting Rights Act designed to enhance the likelihood that racial minorities

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[10] *E.g. Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). *But see City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(invalidating Richmond plan setting aside 30% of government contracts for minority owned enterprises in absence of a showing of remedial need).

[11] *See* Neuborne, "Observations on Weber," 54 N.Y.U.L.Rev. 546, 548-49, n.9 (1979).

[12] *Compare Kahn v. Shevin*, 416 U.S. 312 (1974) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)(broad societal discrimination may trigger voluntary efforts at remedial process) with *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(past discrimination must occur in particularized setting).

[13] *Compare Fullilove v. Klutznick*, 448 U.S. 448 (1980) with *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

[14] *See e.g., United Steelworkers v. Weber*, 443 U.S. 193 (1979)(judicial finding of past discrimination unnecessary, so long as reasonable apprehension of past discrimination present); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989)(legislative finding of past discrimination invalid in absence of relevant evidence).

[15] *See Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986)(authorizing consent decree benefits to nonvictims); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986)(authorizing court awarded benefits to nonvictims).

would be elected in New York City. In *United Jewish Organizations*, the Court was confronted with a breakdown in the democratic process that had reduced voter participation in areas of New York City to less than 50% of the eligible voting population, thus triggering the provisions of the Voting Rights Act. While the causes of the breakdown did not involve proven, or even suspected, unconstitutional behavior on the part of New York City officials,[16] both the Department of Justice and this Court recognized that the imperative of repairing central democratic institutions justified Congress' decision to provide for the use of race conscious district lines, despite the adverse impact on white voters. Likewise, Justice Powell's determinative opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 269 (1978), upheld the use of race conscious admissions criteria in institutions of higher education because the absence of women and minorities from educational institutions was adversely affecting the educational mission. As Justice Powell understood, not only does the very presence of women and minorities in an academic setting act to dispel negative stereotypes, but their presence and participation enriches the educational climate by introducing divergent perspectives and viewpoints. No professor who has taught classes that have evolved from all white male enclaves prior to *Bakke* into multi-racial, gender-blind colloquia would dispute the wisdom of Justice Powell's insight that affirmative action on behalf of women and racial minorities is justified, not merely to remedy the ongoing consequences of past discrimination, but to enrich the academic free market in ideas that is artificially impoverished by their absence.

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[16] In *UJO*, the provisions of the Voting Rights Act were triggered by the low voter turnout and the historic use of a literacy test in New York City. This Court had upheld the constitutionality of literacy tests in local elections. *See Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).

Thus, while "remedial" use of race or gender is designed to undo the continuing consequences of past identifiable discrimination, "structural" affirmative action involves the repair of an institution of importance to American society whose functioning is currently impaired by the historic exclusion of women and minorities. *See also Taylor v. Louisiana*, 419 U.S. 522 (1975)(jury integrity imperilled by laws encouraging nonparticipation by women); *Duren v. Missouri*, 439 U.S. 357 (1979).

Of course, this Court has recognized that the decision to use race or gender as an allocative criterion, whether driven by a "structural" desire to repair a damaged institution or by a "remedial" desire to right a past wrong, must be tempered by the impact on third persons whose interests will be affected by the use of such criteria. Thus, where an innocent third person is asked to surrender a settled status, the Court's decisions suggest that even a valid "structural" or "remedial" use of race or sex may be unduly disruptive of earned expectations.[17] Where, however, a third person is asked to forego a mere expectancy, the Court has held that the imperative of repairing a damaged institution or righting a past wrong will generally justify the use of otherwise irrelevant criteria.[18]

Finally, the inevitable disagreements that will arise over whether recourse to "remedial" or "structural" af-

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[17] *E.g. Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

[18] *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). *Compare Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986)(invalidating layoffs) with *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986)(upholding promotions and hiring).

firmative action is warranted in particular settings,[19] and the difficult moral calculus required to assess third person loss,[20] raise troubling questions of relative institutional competence. In resolving those questions, this Court has held that the absence of a perceived danger of majoritarian overreaching justifies a more deferential standard of judicial review when evaluating congressionally designed affirmative action plans, whether "structural" or "remedial."[21] *See* pp.18-19, *infra*.

B. The FCC Affirmative Action Plans At Issue Herein Are Valid Both As Congressionally Imposed "Structural" Attempts To Enhance The Diversity Of Viewpoint On The Broadcast Spectrum And As "Remedial" Attempts To Mitigate The Consequences Of Past Discrimination

Congress has directed the FCC to continue two policies designed to increase the number of broadcast frequencies that are owned or controlled by women or

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[19] In a "remedial" context, the issues include (1) whether a reasonable apprehension of past discrimination exists; (2) the identity of the institution that may acknowledge the past discrimination; and (3) the causal nexus between the past discrimination and the present imbalance. In a "structural" setting, the principal issue is whether the imbalance adversely affects the optimum functioning of a critical democratic institution.

[20] In order to engage in the balancing process, the precise loss to third persons must be identified and weighed against the importance of remedying a past wrong or repairing a current institution.

[21] *Fullilove v. Klutznick*, 448 U.S. 448 (1980)(Congress dominated by white males elects to give preference to minorities; subjected to deferential scrutiny); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)(Congress dominated by white males seeks to improve minority representation; subjected to deferential scrutiny).

members of racial minorities.[22] One policy, at issue in the *Metro Broadcasting* case, grants applicants that are owned or controlled by women or by members of racial minorities a preference in comparative broadcast licensing proceedings.[23] As between substantially equivalent applicants, FCC policy resolves the issue in favor of expanding the number of broadcast voices that are owned or controlled by women or racial minorities. The second policy, at issue in the *Astroline* case, permits a current licensee who is in significant danger of losing a

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[22] The affirmative action policies at issue were initially adopted by the FCC pursuant to its broad mandate to serve the "public interest." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). The basis for the policies is set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* (1978); *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

The judicial history of the policies may be traced through *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C.Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Garrett v. FCC*, 513 F.2d 1056 (D.C.Cir. 1975); *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Steele v. FCC*, 770 F.2d 1192 (D.C.Cir. 1985), *vacated and remanded*, 806 F.2d 1126 (D.C.Cir. 1986); *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C.Cir. 1989), *cert. granted*, ___ U.S. ___ (1990); *Shurberg Broadcasting of Hartford v. FCC*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, ___ U.S. ___ (1990).

Congress' initial expression of support for affirmative action in the FCC context may be found in its approval of the use of racial or gender preferences in connection with the lottery method for allocating broadcast frequencies. *See* H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

[23] The use of minority ownership as a "plus" factor in comparative license proceedings was initially discussed in *WPIX, Inc.*, 68 F.C.C.2d 381 (1978). The granting of a "plus" factor to female ownership was initially discussed in *Gainsville Media, Inc.*, 70 F.C.C. 143 (Rev. Bd. 1978) and *Mid-Florida Television Corp.*, 69 F.C.C.2d 607 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

broadcast license to transfer the license pursuant to a "distress sale" for not more than 75% of its value to an entity that is owned or controlled by a racial minority.[24]

When the FCC announced the possibility of abandoning its affirmative action policies in 1987, Congress explicitly responded by inserting a provision in the 1988 appropriations bill for the FCC forbidding the agency from altering its existing policies. A similar provision was inserted into the 1989 and 1990 FCC appropriations bills. Continuing Appropriations Act for the Fiscal Year 1988, Pub.L. No. 100-202, 101 Stat. 1329; Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub.L. No. 100-459, 102 Stat. 2216-17; Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub.L. No. 101-162, 103 Stat. 1020-21. Congress' thrice-repeated decision to mandate the continuation of the FCC's affirmative action policies constitutes a considered congressional policy choice entitled to respect by the coordinate branches.

(1) Both The Comparative Preference And Distress Sale Plans Are Valid "Structural" Attempts To Enhance Viewpoint Diversity On The Broadcast Spectrum

By mandating the continuation of the FCC's affirmative action policies, Congress sought both to redress past

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[24] Ordinarily, a licensee whose qualifications are in question may not sell its broadcast license until the FCC has resolved its doubts in a noncompetitive hearing. *Northland Television, Inc.*, 42 Rad.Reg.2d (P&F) 1107 (1978). The initial use of distress sales was an exception to the general policy of nontransferability in cases of bankruptcy or disability. In 1978, the FCC expanded the category of distress sales to include sales to purchasers owned or controlled by racial minorities. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C. 979, 983 (1978).

discrimination[25] and to repair a critical American institution imperilled by the virtual absence of voices controlled by women and racial minorities from the broadcast spectrum. Congress realized that the artificial absence of broadcast voices owned or controlled by women and racial minorities endangers the integrity of the free market in ideas.[26] *Cf. Taylor v. Louisiana*, 419 U.S. 522 (1975)(absence of women from jury venire threatens integrity of fact-finding process). As Justice Powell recognized in *Bakke* and as this Court recognized in *United Jewish Organizations*, the artificial absence of a

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[25] Given the clear "structural" justification for Congress' decision to adopt an affirmative action plan, it is not necessary to consider at length whether the plan should be also upheld as a "remedial" plan, and our brief does not do so.

It is worth noting, however, that Congress expressly found that the absence of women and racial minorities from the broadcast spectrum was a result of historic patterns of discrimination. *See* H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). Given the deferential standard of review that governs congressional decisions to recognize the consequences of past patterns of discrimination, *see Fullilove*, Congress' finding of past discrimination affecting the broadcast industry is sufficient to justify a narrowly tailored "remedial" affirmative action plan. *Id.*

It is also worth noting that the exclusion of women and minorities from the broadcast industry is due to more than generalized societal discrimination. As demonstrated in the *amicus* brief submitted by the Congressional Black Caucus, *et al.*, the FCC's past policies and practices contributed to this discriminatory pattern.

[26] This finding by Congress parallels the conclusion of the FCC, whose 1978 report on minority ownership noted:

> Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978).

significant segment of the populace from one of the core institutions of representative democracy threatens the integrity of the democratic process by eliminating a potential source of different perspectives. It is no coincidence, therefore, that the contexts in which this Court has recognized the imperative of "structural" affirmative action have involved the central institutions of representative democracy: the electoral process in *United Jewish Organizations*; the process of higher education in *Bakke*; the jury in *Taylor*; and the desire for Indian self government in *Morton v. Mancari*.

This case involves an application of the identical principles to the most significant vehicle for communication in a modern democratic society, the scarce societal resource of the broadcast spectrum. *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Acknowledging that the FCC's affirmative action policies promote viewpoint diversity does not mean that all members of a group think or believe the same thing. Obviously, a broad divergence of views will exist within every group. However, when the voice of an entire segment of the populace is absent from one of the core institutions of representative democracy, a significant danger is created that a divergent point of view will be overlooked.[27]

Indeed, for precisely that reason, Section 307(b) of the Communications Act, 47 U.S.C. §307(b), currently grants a dispositive preference to the first applicant to provide local broadcast service to an otherwise unrepresented locality. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C.Cir. 1985); *Radio Jonesboro, Inc.*, 96

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[27] As Congress observed in 1987: "Diversity of ownership results in diversity of programming." S.Rep. No. 182, 100th Cong., 1st Sess. 76 (1987). Five years earlier, Congress observed that the "nexus" between minority ownership and diversity has been "repeatedly recognized." H.R.Conf.Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

F.C.C.2d 1106, 1109 (Rev. Bd. 1984), *aff'd*, 100 F.C.C.2d 941 (1985)(local residence as "plus" factor). One need not assume that all residents of a particular locality will think or believe the same thing to recognize the danger of leaving a locality entirely unrepresented in the broadcast spectrum. The goal in both settings is the same: to allocate scarce broadcast frequencies so as to assure the expression of as many divergent viewpoints as possible and to assure that no discernible segment of American society is left voiceless in the broadcast spectrum.[28]

(2) Congress' Decision To Adopt An Affirmative Action Policy Is Subject To A Deferential Level Of Scrutiny

As with any "structural" affirmative action program, reasonable people may differ over whether the institution at issue is in need of repair and whether the precise plan unfairly "trammels" the interests of innocent third persons. In this case, Congress has made a considered judgment that the absence of female and minority controlled voices from the broadcast spectrum impairs the optimal functioning of an important American institution and has mandated two corrective programs in an effort to repair the institution. A threshold issue, therefore, is the level of judicial scrutiny to which Congress' judgment may properly be subjected.

In *Croson*, Justice O'Connor, writing for the Court, suggested that the use of "suspect" criteria such as race or sex in the allocation of local government benefits

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[28] This Court has endorsed the FCC's attempts at securing diversity by upholding bans on cross ownership of broadcast facilities and newspapers in the same geographical setting, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and by applying the antitrust laws to the communications industry. *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

should be subjected to the most searching level of judicial scrutiny -- a requirement that it advance a compelling state interest by the least drastic means. While *amici* believes that the policies at issue in these cases satisfy even the most rigorous level of judicial scrutiny, three reasons exist to apply a more deferential standard of review to congressional judgments to resort to affirmative action.

First, as the Court noted in *Croson*, Congress is vested with unique powers and responsibilities to enforce the Equal Protection Clause of the Fourteenth Amendment.[29] Where, as here, Congress makes a judgment that the attainment of the goals of the Equal Protection Clause can best be achieved through the adoption of an affirmative action plan, proper respect for the constitutional structure requires a significant level of deference to Congress. *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974).

Second, as Justice Scalia noted in his concurrence in *Croson*, the smaller the local governmental unit, the greater the danger of "capture" by a transient majority bent on unfair treatment of the local minority. Thus, whatever the wisdom of deploying strict scrutiny at the local level as a prophylactic check against majoritarian overreaching, no basis exists to deploy it at the national level when Congress seeks to benefit minorities. When affirmative action plans are at issue, the very size and complexity of our pluralistic society at the national level provides the needed institutional check against unfair

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[29] Although the Fifth Amendment, which controls the constitutionality of an Act of Congress, does not contain an explicit equal protection clause, this Court has ruled that the due process language of the Fifth Amendment subsumes the equal protection language of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

use of affirmative action by Congress. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)(representation of state interests in Congress permits Eleventh Amendment override by congressional action).

Finally, in *Croson*, the local legislative body that made the decision to invoke a minority set-aside program was controlled at the time by one of the groups the plan was designed to benefit. Where a local majority elects to benefit itself at the expense of members of another race, this Court apparently concluded in *Croson* that traditional *Carolene Products* analysis calls for strict judicial scrutiny of the decision. *See* J. Ely, *Democracy and Distrust* (1980).[30] Where, however, a legislative body elects to benefit radically underrepresented groups at the expense of the political majority, as in *Fullilove* or *Morton v. Mancari*, there is no equivalent basis for judicial suspicion of that legislative decision.

(3) Both Plans Under Review Advance A Compelling State Interest, Are Narrowly Tailored And Do Not Unfairly Affect The Interests Of Third Persons

Whatever level of scrutiny is applied, the affirmative action policies now under review pass constitutional

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[30] The suggestion in *Croson* that strict scrutiny is required whenever a local legislative body acts to benefit the racial group that controls the legislature appears to overstate the power of local legislatures. When, as in *Croson*, the state legislature, the Congress, and the surrounding economic community are all overwhelmingly white, *amici* do not believe that strict scrutiny is necessary.

In any event, strict scrutiny should not be applied to the gender based preference at issue in *Metro Broadcasting* since this Court has consistently declined to apply strict scrutiny to test the validity of gender based classifications. It would be fundamentally unfair to refuse to apply strict scrutiny to gender based classifications that harm women, but to insist upon strict scrutiny of classifications designed to assist them.

muster. Specifically, the FCC's affirmative action policies can and should be upheld as narrowly tailored efforts at advancing a compelling governmental interest.

As *amici* has noted, the compelling governmental interest is the attempt to assure that no significant segment of American society is left voiceless in the broadcast spectrum. Given the virtual absence of broadcast licenses owned or controlled by women or minorities,[31] Congress had an adequate factual predicate for its fear that the existing distribution of broadcast licenses threatened the integrity of the free market in ideas. Just as Congress is justified in fearing the exclusion of geographical voices from the spectrum, so it is justified in fearing the social consequences of the absence of voices controlled by women and minorities. Precisely such a "structural" interest in enhancing diversity of viewpoint was deemed compelling in *Bakke*; was found sufficient to justify affirmative action plans in *United Jewish Organizations* and *Morton v. Mancari*; and underlay the Court's reasoning in *Taylor v. Louisiana*. Thus, unlike *Croson*, a factual predicate for the use of affirmative action by the FCC was clearly established by Congress, whatever the standard of review.

(a) The Narrowly Tailored Nature Of The Use Of Race Or Gender As A "Plus" Factor In Comparative Licensing Proceedings

The use of race or sex as a "plus" in a comparative licensing proceeding imposes virtually no loss on third persons. Since the preference can be dispositive only when the contending applicants are substantially equivalent by other measures, the preference merely operates, in effect, to deny third persons the "right" to a random breaking of a tie. Where Congress has determined that the free market in ideas would be strengthened by encouraging otherwise absent voices on the broadcast spectrum, the use of race or sex to break a tie between equivalent broadcast candidates should not pose a close call.[32] Indeed, it is precisely the technique that was upheld in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

(b) The Narrowly Tailored Nature Of The "Distress Sale" Policy

Given the exceptionally narrow reach of the comparative licensing policy, it has been impossible to mount a convincing argument that it sweeps too broadly and unnecessarily "trammels" the interests of third persons. On the other hand, Judges Silberman and MacKinnon deemed the "distress sale" policy unduly broad because they perceived it as an absolute bar to the participation of nonminority bidders in the distress sale process and thus analogous to the fixed racial quota struck down in *Bakke*.[33] That view overstates the impact of the distress sale policy on third persons in several important ways.

First, unlike the layoffs in *Wygant* or the seniority rules in *Stotts* and *Teamsters*, the distress sale policy does not oust a third person from a settled status or act to

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[31] When the FCC initially adopted its affirmative action policy, fewer than 1% of broadcast licenses were owned or controlled by members of racial minorities. *FCC Statement of Policy on Minority Ownership of Broadcasting Facilities* (1978). *See* n.22, *supra*.

[32] This is not a case where race or sex is given so much weight in a comparative proceeding that it outweighs a clear advantage in traditional qualifications possessed by a third person. Even in such settings, moreover, this Court has held that affirmative action plans would be valid. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). *A fortiori*, such plans are valid when the contending candidates are otherwise equally qualified.

[33] The distress sale affirmative action policy benefits members of racial minorities, but not women.

frustrate vested expectations. As such, its impact is far closer to the frustration that a third person suffers whenever an affirmative action hiring or promotion plan is established. It is certainly no greater than the frustration experienced by third persons in *Fullilove*, *Weber*, *Paradise*, or *Johnson*.

Moreover, the existence of an actual injury-in-fact cannot be assumed merely because the distress sale policy has been invoked. In *Bakke*, there was ample reason to believe that the 16% quota materially diminished the plaintiff's chances of gaining admission to medical school.[34] Under the FCC rules, however, no prospective licensee had access to a distress sale prior to the adoption of the affirmative action plan.[35] If that plan were struck down, all prospective licensees would presumably be remanded for a comparative licensing proceeding in which ties would be broken in favor of the minority broadcaster. Unless the record demonstrates that a nonminority applicant would have defeated the minority broadcaster in this comparative proceeding or, at the very least, was foreclosed from meaningful "competition" for the broadcast license, *Bakke*, 438 U.S. at 305, the distress sale provisions have not "caused" the nonminority broadcaster any discernible loss. *See e.g.*, *Carey v. Piphus*, 435 U.S. 247 (1978); *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977); *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).[36]

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[34] Bakke's scores made it highly likely that he would have been admitted to the Davis Medical School but for the minority admissions quota. 438 U.S. at 276-77.

[35] Distress sales were permitted to avoid bankruptcy or other similar emergency. The adoption of the affirmative action plan in no way affects the emergency distress sale proceeding which remains open to all bidders.

[36] Here, the record is silent on the relative qualifications of the com- (continued...)

Second, the distress sale policy has affected only a miniscule portion of the national market in broadcast licenses. According to the record, only 33 stations were transferred to minority owners via a distress sale during a seven year period in the 1980's. This total "represent[s] 0.28% of all broadcast stations in the United States, far below the 10% of annual public works appropriations directed to minority businesses in *Fullilove*." *Shurberg Broadcasting*, 876 F.2d at 950-51 (Wald, J., dissenting)(footnote omitted).

Finally, the decision below mischaracterizes the actual "disqualification" suffered by third persons under the current distress sale rules. Contrary to the suggestion of the lower court, nonminorities are not absolutely disqualified from economic participation in the distress sale process. They are eligible without restriction to participate in both limited and general partnerships in connection with a distress sale so long as the broadcasting entity is controlled by a racial minority.[37] Since the purpose of the distress sale is to increase minority-controlled voices, nonminorities are permitted -- indeed encouraged -- to participate economically in the "bargain

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[36] (...continued)
peting applicants in *Astroline Communications*. At most, therefore, the matter should be remanded to the FCC to permit Shurberg Broadcasting to show that it has suffered an injury-in-fact from the distress sale rules that would be redressed by a decision striking them down. Otherwise, there is a serious question of Article III standing under this Court's opinions. *See Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976).

[37] In 1982, the FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group and owned at least 20 percent of the purchasing entity. Under this policy, it remains possible for nonminorities to play extensive roles in the distress sale process. *In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

sale" process as long as they cede control of the broadcaster to an otherwise radically underrepresented minority voice. In effect, the distress sale policy offers nonminorities a generous economic discount if they will help to finance a minority controlled broadcast voice, but denies them the windfall benefit if they insist upon adding yet another majority voice to the broadcast spectrum. Such a policy of economic incentive hardly resembles a violation of the anti-discrimination principle.

(c) Congress Should Not Be Required To Adopt Programmatic Controls As A Means Of Promoting Broadcast Diversity

Attempts to assure that divergent viewpoints are adequately present on the broadcast spectrum could conceivably take the form of substantive content regulation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). However, government attempts at regulating media content are fraught with First Amendment pitfalls. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Moreover, even if substantive regulation were permissible, its desirability is, to say the least, questionable. Instead, Congress has opted for a structural attempt to assure the optimum functioning of the free market in ideas. Given the unquestioned factual predicate for Congress' action and the narrowly tailored nature of the FCC's affirmative action policies, no basis exists for judicially second guessing the considered judgment of Congress.

CONCLUSION

For the above stated reasons, the decision in *Metro Broadcasting, Inc. v. FCC*, No. 89-453, should be affirmed and the decision in *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700, should be reversed.

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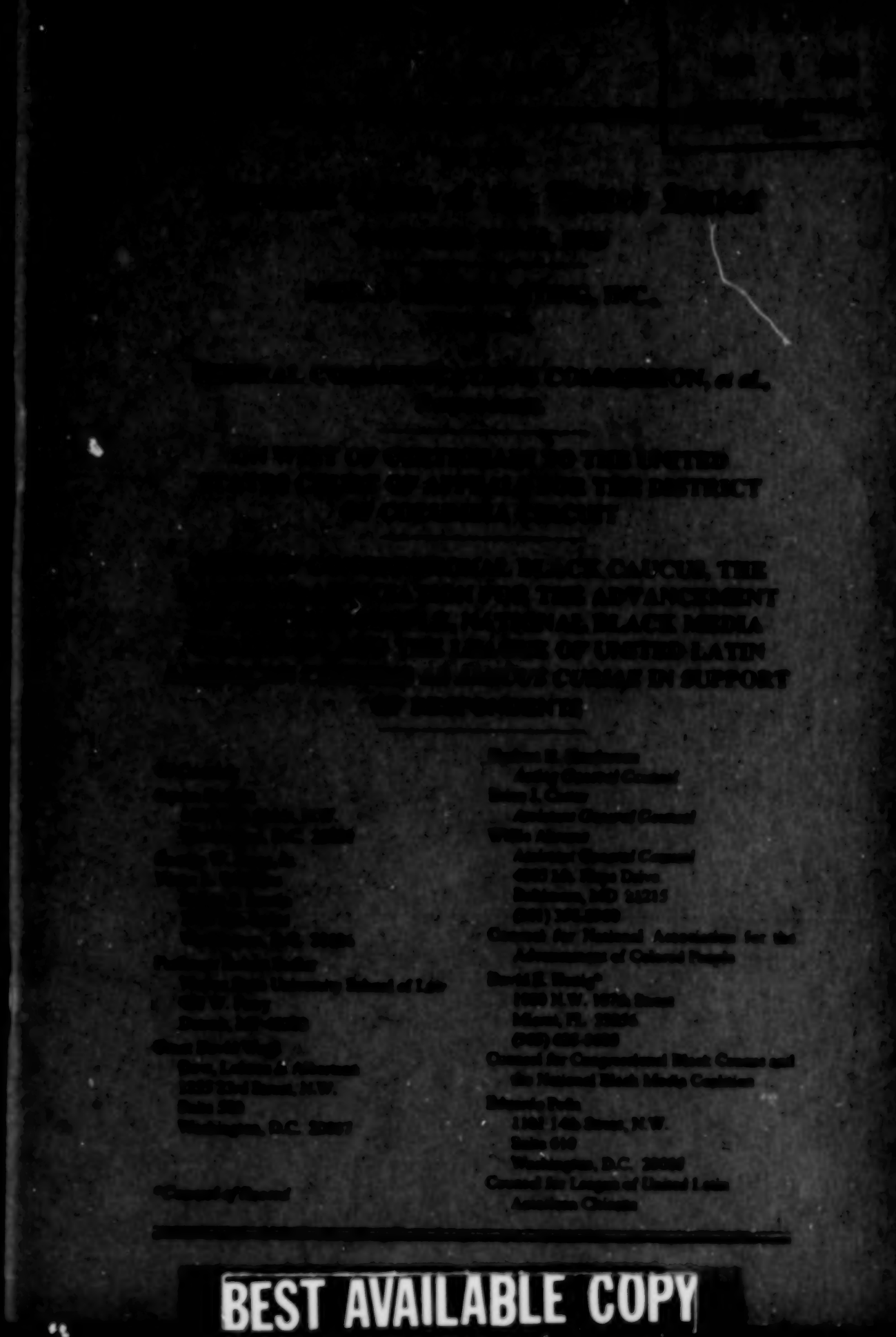

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No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTIONS PRESENTED

Whether Congress may require the Federal Communications Commission to consider the race of an applicant for a radio or television license to foster diversity among broadcast licensees and to avoid perpetuating the effects of prior state-sanctioned discrimination.

INTEREST OF AMICI CURIAE

The Congressional Black Caucus ("CBC") was formed in 1970 when thirteen Black members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of Black and minority citizens. The vision and goals of the original thirteen members, "to

promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the Caucus. The CBC is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity.

The National Association for the Advancement of Colored People ("NAACP") is the oldest and largest civil rights organization in the United States. It is a non-profit corporation with over 500,000 members and 2,300 branches and youth units throughout the country. The basic aims of the organization are to advance minority participation in all aspects of society and to destroy all limitations or barriers based upon race or color. The NAACP has long been involved in strengthening the machinery for combatting discrimination within the media and in maintaining the policies aimed at remedying societal discrimination and promoting diversity of broadcast programming.

The National Black Media Coalition ("NBMC") is the principal civil rights organization focusing on minority employment and ownership in the broadcast media. Since its founding in 1973, NBMC has participated in dozens of adjudicatory and rulemaking proceedings to vindicate and expand the FCC's minority ownership policies.

The League of United Latin American Citizens ("LULAC") is a sixty-year old national membership organization concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. LULAC has actively promoted minority employment and minority ownership policies in the broadcast media before the FCC and the courts.

The District of Columbia Circuit affirmed the comparative hearing policy prescribed by Congress and implemented by the Federal Communications Commission ("FCC"). The policy in

question is designed not only to remedy minority underrepresentation in broadcasting, stemming from past discrimination, but also to promote diversity of broadcast programming. Each of the *amici* is vitally interested in the policies implicated by the D.C. Circuit's decision in this case.

SUMMARY OF ARGUMENT

Congress has prescribed the continuation of the comparative hearing policy in order to promote diversity of programming, an interest rooted in the First Amendment, and to avoid the perpetuation of the effects of prior state-sanctioned discrimination, in accordance with its broad powers to enforce the Fourteenth Amendment. Unlike any other legislative body, Congress has the authority to act on the basis of findings to remedy past societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Accordingly, in determining the constitutionality of the distress sale, Congress's choices as to both means and ends are entitled to deference.

This Court has determined that race-based policies must survive strict scrutiny in order to be constitutional. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989). In particular, the policy must further a compelling governmental interest and must be narrowly tailored to achieve that goal. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). Because the comparative hearing policy fulfills those requirements, it is constitutional.

The comparative hearing policy serves the compelling governmental interest in promoting diversity among broadcast licensees, which is derived from First Amendment values. Congress and the Federal Communications Commission ("FCC") have determined that the public is best served by the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326

U.S. 1, 20 (1945). The FCC, empowered by the Communications Act of 1934 to promote the public interest, has decided that diversity of ownership is one means by which the listening and viewing public will be assured of receiving a broad spectrum of ideas. As a result, the FCC's policy to encourage diversity is an integral part of the agency's regulatory framework. The comparative hearing policy is just one component of the FCC's overall objective to diversify broadcast licensees.

The comparative hearing policy also serves the compelling state interest of remedying the effects of prior state-sanctioned discrimination. Congress and the FCC have found that the paucity of minority broadcast licensees today is attributable, at least in part, to past discrimination. H.R. Conf. Rep. 765, 97th Cong. 2d Sess. 43 (1982). Without affirmative action specifically directed toward increasing the number of minority licensees, the effects of their exclusion will continue indefinitely, since most licenses are renewed. The comparative hearing policy recognizes these facts and serves to hasten the dismantling of the virtual monopoly of radio and television licenses enjoyed today by nonminorities — a monopoly attributable in significant part to state-sanctioned discrimination.

The comparative hearing policy is narrowly tailored to achieve its objectives. The burden on nonminority broadcasters is minimal. Even after seventeen years of operation of this policy, approximately ninety-eight percent of all radio and television licenses are still held by nonminorities. Moreover, the policy is invoked only if no applicant has a clear advantage on the basis of race neutral criteria established by the FCC.

Because the policy is narrowly tailored to foster diversification and to remedy the effects of past discrimination, the use of the minority enhancement credits does not stigmatize minority broadcast licensees. The policy is based upon the premise that minority broadcasters can compete on equal footing with their white counterparts. It does not constitute a rigid quota

that bears no relationship to its ends. Nor does the policy brand its beneficiaries as unqualified, for only qualified applicants are entitled to be beneficiaries of the policy. Instead, the policy is used to promote diversity and equal opportunity where there is no quantifiable difference among all qualified broadcast applicants.

ARGUMENT

I. CONGRESS MAY PRESCRIBE THE CONSIDERATION OF RACE TO PROMOTE DIVERSITY AMONG BROADCAST LICENSEES AND TO AVOID THE PERPETUATION OF THE EFFECTS OF PRIOR DISCRIMINATION.

A. Congress prescribed the continuation of the comparative hearing policy initiated by the FCC in 1978.

Since 1987, Congress has required the FCC to maintain a race conscious comparative hearing policy.[1] This annual directive, appearing in the form of appropriations legislation, approved by the House and the Senate and signed by the President, prohibited the use of any federal monies for the purpose of repealing the policies to promote minority ownership in broadcasting. Any suggestion by the Petitioner, the United States, or other *amici* that such legislation is something less than an Act of Congress is untenable. Moreover, legislative materials preceding the 1987 appropriations bills indicate that Congress intended to preclude any action by the FCC to dismantle the

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[1] *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-10162, 103 Stat. 1020-1021 (1990).

race-conscious comparative hearing policy. *See e.g. Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 2d Sess., 13, 19, 21 (1986) ("*Hearings on H.R. 5373*") (Congressman Leland promised to introduce legislation "codifying existing FCC [diversity policies] . . . because of my fear of an FCC preemptive strike . . . during the Congressional recess."); *see also Minority Ownership of Broadcast Stations: Hearing before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation*, 100th Cong. 1st Sess. 2 ("Congressional response [to the FCC's threatened dismantling of the diversity policies] was immediate, clear and virtually unanimous. Legislation was enacted instructing the FCC not to take any action to eliminate or undermine the minority ownership policies.")[2] The minority enhancement credit policy is thus "a deliberately chosen congressional policy." *Cf. Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 910 (D.C. Cir. 1989). Accordingly, the judgment of the court of appeals may be reversed only if *Congress* lacks power to prescribe the consideration of race[3] in comparative hearings to promote diversity among broadcast licensees and to

[2] Furthermore, it is axiomatic that the FCC, as a creation of Congress is bound to implement the legislative policies of that body. *See e.g. Humphrey's Executor v. United States*, 295 U.S. 605, 628 (1935) (Administrative agency, as creation of Congress, acts as "legislative aid", performing duties specified by the Congress); H. Rep. No. 363, 100th Cong. 1st Sess. 14 (1987) ("Congress created the FCC, the FCC carries out Congress' policies under Congress' standards; Congress oversees the FCC and agencies like the FCC serve . . . as a 'legislative aid'.").

Finally, the court of appeals decisions that may have served to focus the attention of the FCC on the need for action are immaterial to the constitutional validity of the Congressionally prescribed race conscious comparative hearing process. *See e.g. TV-9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[3] As the United States has noted, the policy granting enhancement credits on the basis of gender is not before this Court. Brief for United States at 5 n. 5, *Metro Broadcasting, Inc. v. FCC*, No. 89-453 (filed Feb. 9, 1990) ("U.S. Br.").

avoid perpetuating the effects of prior state sanctioned discrimination.

B. Congress is empowered by the Constitution to take actions to encourage full minority participation in the mainstream of American economic and political life is a reality, as long as those actions are clearly related to the stated ends.

Given the history of state-sanctioned racial discrimination in this country, strict scrutiny is the appropriate standard of review for race conscious governmental action. *E.g., City of Richmond v. Croson*, 109 S. Ct. 706 (1989). That same history, however, demands that this Court leave sufficient room for legislative action to eliminate the consequences of the nation's long failure to recognize that discrimination on the basis of race is immoral, illegal, and unconstitutional.

Congress, unlike any other legislative body, has the authority and the Constitutional mandate to enforce the promise of racial equality embodied in the Fourteenth Amendment in order to eradicate the effects of societal discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Burger, C.J.). Section Five of the Fourteenth Amendment specifically authorizes the political branches of the Federal Government to act to assure that all members of our society participate fully in the political and economic institutions of our nation. *See Id.* Because Congress has broad authority to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, it is thus entitled to deference with respect to both means and ends.[4]

[4] The United States concedes that Congress' judgment "that there is a need for remedial race-conscious action is entitled to significant deference." U.S. Br. at 17.

In addition, strict scrutiny does not authorize this Court to substitute its judgment for that of Congress as to either ends or means. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *Fullilove*, 448 U.S. at 472. Congress, and not this Court, is charged with the responsibility of assuring that the guarantee of the Fourteenth Amendment becomes a reality for those who have been excluded from its protection for most of our history. *See Fullilove*, 448 U.S. at 472, 483-4 (Powell, J.). Accordingly, so long as the basis for Congressional action is discernible, Congress need not compile a record appropriate for judicial or administrative proceedings.[5] *Id.* at 463-7 (Burger, C.J.); *Id.* 448 U.S. at 503 (Powell, J.). Congress's judgment as to the need to take action to encourage full minority participation should therefore be sustained unless it is pretextual.

C. The comparative hearing policies further the compelling government objective of diversity among broadcast licensees.

This Court has recognized the First Amendment values served by the FCC's general policies to encourage diversity among broadcast licensees. *E.g., FCC v. National Citizens Committee*, 436 U.S. 775, 795 (1978). Throughout the history of broadcast regulation, the scarcity of frequencies for which applicants compete has compelled the FCC to make certain that licenses are distributed in a manner which, *inter alia*, ensures that the public has access to a variety of programming, and in so

[5] It should be noted, however, that Congress, through several hearings, has compiled an extensive record regarding the causes and effects of the underrepresentation of minorities in media ownership. *See e.g. Hearings on H.R. 5373*, 99th Cong. 2d Sess. (1986); *Minority participation in the Media: Hearings before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong. 1st Sess. (1983); *Parity for Minorities in the Media: Hearing before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong. 1st Sess. (1983).

doing, fulfills the mandate set forth in the Communications Act of 1934. As the Commission noted upon enacting the comparative hearing policy: "Diversification of control is a public good in a free society and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Policy Statement on Comparative Hearings*, 1 F.C.C.2d 393, 394 (1965).

Thus, in the context of regulation of the broadcast industry, diversity itself is the good. *Cf. Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 314 (1978) (Powell, J.). Where the Federal Government maintains strict control over access to a scarce resource such as the broadcast spectrum, it may conclude that the public interest requires that no single person, entity, or group should be granted a monopoly of that resource — intentionally, inadvertently, or due to factors beyond its control. In particular, if its own actions or failure to act may have resulted in excluding identifiable groups, the Federal Government may conclude that the public interest requires affirmative efforts to increase the presence of those previously excluded.

The comparative hearing policy thus rests firmly on the presumption that the public interest is best served by the widest possible diversity among decision-makers. S. Rep. 192, 100th Cong., 1st Sess. 76 (1989); H.R. Conf. Rep. 765, 97th Cong., 2d Sess. 40 (1982); *Shurberg*, 876 F.2d at 942 (Wald, C.J., dissenting). The comparative hearing policy is just one aspect of the FCC's general diversity policies, and is integrally related to the FCC's broader regulatory policies, including, for example, deregulation.[6] Contrary to the arguments of Metro Broadcasting

[6] Several FCC rules regarding ownership of stations were enacted for purposes of providing the public with diverse programming. *See e.g.*, Chain Broadcasting Rules, 3 Fed. Reg. 747 (1938), in which the Commission set forth the areas of concern regarding network ownership of radio stations. Even at that time, the FCC had concluded that ownership had an effect upon the programming received by viewers. The result of that assumption was a rule

continued

and the United States, the validity of the FCC program does not depend at all on statistical proof that the programming decisions

limiting network ownership of radio stations. *See also* 47 C.F.R. § 73.3555, the FCC's multiple ownership rule, which prohibits licensees from owning two radio or television stations whose service areas overlap; and 47 C.F.R. § 73.658(f), prohibiting network ownership of television stations in areas "where the existing television broadcast stations are so few or of such unequal desirability . . . that competition would be substantially restrained by such licensing."

These rules were enacted to increase competition among licensees by prohibiting a monopoly of ownership by any one group, and to thereby increase the variety of programs available to the public. *See Hudson Valley Broadcasting*, 13 Rad. Reg. (P&F) 49, 58-59 (1956) ("The plain intent of . . . Rule [73.658(f)] is to prevent ownership or substantial measure of control . . . as to restrain, through limitation of competition, the receipt by the public of a variety of . . . programs.") The nexus between diversity of ownership and diversity of programming has thus been an underlying assumption of the FCC diversity policy since its inception.

of black or other minority licensees will be affected by their personal tastes, rather than the market.[7]

Nonetheless, by definition, diversity assures that programming decisions will not be made by a single person, entity, or group. Similarly, of course, the views of blacks and other minorities in America may be identical to those of white males on many issues of public policy. Diversity assures,

[7] Several studies do suggest, however, that the race of a broadcast licensee does have an effect upon programming. *See, e.g.*, The Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988). Data collected by the FCC from nearly 9,000 of its 12,101 television and radio stations, indicated that there is a strong correlation between minority ownership and programming targeted to minority audiences. While only 20% of stations without any Black ownership responded that they provide programming directed to Black audiences; 65% of stations with Black ownership said that they did so. Only 10% of stations without Hispanic ownership responded that they provided Hispanic programming, while 59% of stations with Hispanic owners did so.

This study was consistent with the results of four other studies addressing the same question. Johnson, Media Images of Boston's Black Community, (Jan. 28, 1987) (available at the William Monroe Trotter Institute, University of Massachusetts at Boston) (unpublished manuscript), (examining treatment of over 3000 local news stories by white and Black-owned media and finding statistically significant differences in racial identifications and positive or negative treatment of certain types of stories); Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study, (1986) (available at the Department of Telecommunication, Michigan State University) (unpublished study) (concluding that minority owned television stations had statistically significantly higher representation of Blacks on newscasts than did comparable nonminority owned stations); Jeter, "A Comparative Analysis of the Programming Practices of Black-Owned, Black-Oriented Radio Stations and White-Owned, Black-Oriented Radio Stations," Ph.D. Dissertation, University of Wisconsin, (1981) (finding that Black-owned radio stations had statistically significantly more diverse playlists, featuring jazz, rock, blues, gospel formats, e.g., than did white-owned, Black-oriented stations); Honig, "Relationships among EEO, Program Service, and Minority Ownership in Broadcast Regulation," *printed in Proceedings of the Tenth Annual Telecommunications Policy Research Conference* 85, 87-88 (1983) (finding, for example, that in Black oriented stations, 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black).

Of course, it would be stereotyping to suggest that all minorities *should* only target their programming towards their respective groups, or that all minorities would even desire to do so. However, the evidence clearly shows that minority broadcasters *do* make special efforts to serve those members of their own racial group.

however, that on those occasions when race does make a difference, the voices of minority Americans will be heard distinctly and not as edited or screened by white males, to the benefit of the entire nation. *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979, 982 (1978).

D. The comparative hearing policy also furthers the compelling government objective of avoiding the perpetuation of the effects of prior discrimination.

As the Petitioner concedes, "the Federal Government has a compelling interest in remedying past discrimination and its lingering effects." Brief for Petitioner at 36,[8] *Metro Broadcasting, Inc. v. FCC*, No. 89-453 (filed Feb. 9, 1990) ("Pet. Br."). The distribution of radio and television licenses today is the product of a system of state-sanctioned preferences favoring white males that has existed since the founding of this nation. Accordingly, Congress's actions to redress the effects of the long history of legalized discrimination and to avoid the perpetuation of the legacy of discrimination are completely justified.

"No one doubts that there has been serious racial discrimination in this country." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986). For the first 150 years of the nation's history, this Court explicitly condoned discrimination against black Americans. *Scott v. Sandford*, 60 U.S. (19 How.) 39 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896). As a result, for the first 27 years of federal broadcast licensing, which includes the first 20 years of the FCC's existence, the licensing process occurred within this context of state-sanctioned discrimination against black Americans. This Court's recognition in 1954 that

[8] Metro Broadcasting's reliance on the FCC's statements in the court of appeals that the comparative hearing policy was not intended to remedy prior discrimination by the FCC or others is misplaced. Today, the comparative hearing policies are specifically prescribed by federal legislation. It is the constitutionality of Congress, action that is at issue in this case.

discrimination against black Americans in public education was inconsistent with the promise of equal protection did not eliminate racial discrimination or racism, as the Court's subsequent decisions eloquently attest. *United States v. Paradise*, 480 U.S. 149 (1987); *Cooper v. Aaron*, 358 U.S. 1 (1958). This Court has further acknowledged that neither the Civil Rights Act of 1964 nor subsequent legislation has eliminated discrimination on the basis of race or racism. *See e.g. Fullilove*, 448 U.S. at 477.

Until 1978 the FCC procedures for awarding radio and television licenses ignored the "lingering effects" of state-sanctioned racial discrimination on the ability of black Americans to compete for radio and television station licenses. As a consequence, virtually all broadcast licenses were awarded to white males.[9] In fact, not a single radio or television broadcast license was awarded to any black American after a comparative hearing until 1975.[10] By 1978, when the FCC adopted the comparative hearing policy, most radio and television licenses had been awarded.[11] FCC inaction during much of its history makes it at least a "passive participant" in the virtual exclusion of minority broadcast licensees.[12]

[9] Testimony of John Payton before the U.S. Senate Committee on Commerce, Science, and Transportation, Communications Subcommittee 21 n. 36 (Sept. 15, 1989).

[10] Testimony of David Honig before the FCC *en banc* AM Improvement Hearing 15 (Nov. 16, 1989). In 1949, however, Jesse Blayton purchased an existing station. Brief for NABOB at 17, *Astroline Communications Co., L.P. v. Shurberg Broadcasting of Hartford*, No. 89-700 (filed Feb. 9, 1990), citing M. Muhammed, "Minority Participation in Broadcasting," *Dollars & Sense*, May/June 1979 at 18. The first permit to construct a new broadcast station was awarded in 1956. Honig Testimony; M. Muhammed, *supra*.

[11] Payton Senate Testimony at 21.

[12] In addition, the FCC's actions which gave a head start in spectrum acquisition to licensees who discriminated against Blacks materially contributed to the present day underrepresentation of minorities in broadcast station ownership. Brief for Congressional Black Caucus, *et al.* at 20-22 and nn. 27-32, *Astroline Communications Co., L.P. v. Shurberg Broadcasting of Hartford*, No. 89-700 (filed Feb. 9, 1990).

Congress and the Commission have found that the paucity of minority broadcast licensees today is attributable at least in part to past racial discrimination. *E.g.*, H.R. Conf. Rep. No. 765 at 43; *Statement of Policy on Minority Ownership*, 68 F.C.C.2d at 981. Without affirmative action specifically directed toward increasing the number of minority licensees, white males will continue to control virtually all radio and television stations in this country. Race neutral polices seeking diversification of the ownership of radio and television stations failed to increase the number of minority licensees. Furthermore, because most licenses are renewed, the initial awards affect the distribution of licenses long into the future. *See generally Central Fla. Enterprises v. FCC*, 683 F.2d 503, 506-10 (D.C. Cir. 1982).[13]

The comparative hearing policy recognizes these facts, and serves to hasten the dismantling of the virtual monopoly of radio and television licenses enjoyed today by white males — a monopoly that is attributable in significant part to state sanctioned discrimination. The comparative hearing policy also attempts to correct the FCC's failure to acknowledge the consequences of state sanctioned racial discrimination before 1978. The equal protection component of the Fifth Amendment does not require Congress to ignore this nation's long, sordid history of racial discrimination. To hold that Congress must disregard that history and, more important, its present consequences would pervert the concept of equal protection and serve only to perpetuate the preferred place of white males throughout this nation's economic and political institutions.

[13] The United States correctly notes that significant numbers of radio and television licenses are transferred each year, but only the most well-financed Americans can even consider entering the bidding in the major markets today, *see* Owen, Beebe, and Manning, *Television Economics* 114 (1974); there are very few blacks, Hispanics, or women in that group.

E.The comparative hearing policy is narrowly tailored to achieve its objectives.

The burden of the comparative hearing policy on nonminority broadcasters is minimal. No nonminority applicant is excluded from competition for any license. The policy is invoked only if no applicant has a clear advantage on the basis of the race neutral criteria established by the FCC.[14] In effect, the policy functions as follows: when there is no significant quantitative difference among the applicants in their media holdings and in the extent to which their owners will be integrated into station management, the FCC advances the public interest in diversity by awarding the license to those who are least represented among current licensees.[15] Accordingly, any of several factors considered by the FCC can be dispositive.[16]

[14] *See Alexander S. Klein, Jr.*, 86 F.C.C.2d 423, 428-429 (1981) (qualitative enhancements are important, but cannot overcome clear quantitative differences in integration proposals.)

[15] Metro Broadcasting emphasizes the potential importance of the applicant's race in modern comparative hearings, but omits any mention of the critical fact: seventeen years after this policy was adopted, approximately 98% of all radio and television licenses still are held by non-minorities.

[16] The fact that, as Metro contends, the policies have been effective in encouraging applicants who own no other licenses (and discouraging applicants who own other licenses) is not a criticism, but confirmation of the effectiveness of the policies.

Metro also complains that the comparative hearing policies may be circumvented by careful structuring of the application. If the FCC concludes that the ownership structure of any applicant is an attempt to circumvent the spirit of the comparative hearing policy, it may reject such applications. Presumably, the credit that Metro Broadcasting received as a consequence of its "19.8% principal who was black" was not the result of circumvention.

In any case, the FCC has not hesitated to exercise its broad powers to discourage sham applications. *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 3 F.C.C.Rcd 5179 (1988).

Moreover, a broadcast applicant who obtains a license through the minority ownership policies is not insulated from FCC sanctions for violating

continued

The goal of diversity of broadcast licensees cannot be achieved with race-neutral policies. The FCC adopted the comparative hearing policy only after race neutral policies had proven ineffectual.[17] The need for race conscious programs arises in large part from the history of racial discrimination that produced a virtual white male monopoly of mass media licenses.

II. THE COMPARATIVE HEARING POLICY DOES NOT STIGMATIZE MINORITY BROADCAST LICENSEES.

Because the comparative hearing policy is narrowly tailored to advance diversification and to remedy the effects of past state-sanctioned discrimination, it does not stigmatize minority broadcast licensees. *See Fullilove*, 448 U.S. 521 (Marshall, J.). As set forth more fully above, the policy does not consist of a rigid quota or set-aside which is not rationally related to the goals of Congress or the FCC. The policy is grounded instead in the notion that some race-based measures are necessary to advance diversification and compensate for past state-sanctioned exclusion of minorities.

The awarding of minority enhancement credit does not assume any inability to compete in the future on the part of minority broadcasters. On the contrary, the policy is activated only if a minority applicant's qualifications are quantitatively similar to competing applicants. Thus, an applicant may be awarded a broadcast license on the basis of the comparative hearing policy only if it is "qualified to do the work" in the first

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the terms of the license. *See Silver Star Communications-Albany Inc.*, 3 F.C.C. Rcd. 6342 (Rev. Bd. 1988) (licenses revoked where minority distress sale purchaser failed to operate stations personally as required by the terms of his license).

[17] The distinction the United States offers between efforts to increase diversity of programming and efforts to increase diversity of ownership is a distinction without a difference, for the FCC has attempted to achieve diversity of programming principally through diversity of ownership

instance. *Id.* Because all applicants must meet the same basic qualifications in order to be considered for licensing, *Policy Statement on Comparative Hearings*, 1 F.C.C.2d at 394, the consideration of race in this context functions only as a "plus-factor," which is necessary to address the history of state sanctioned discrimination which has resulted in the virtual absence of minorities from the broadcast industry. Thus, the policy does not brand its beneficiaries as unqualified, since all broadcasters are held to the same stringent qualifying standard from the beginning.[18]

The comparative hearing policy is thus carefully designed to avoid stigmatizing minority licensees. In particular, the policy has a remedial purpose: to provide minority broadcasters with the access to the licensing process which was denied them through state-sanctioned discrimination. *Cf. Croson*, 109 S. Ct. at 2767. ("Unless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.") Moreover, it has affected only a small number of nonminority broadcasters, such that only two percent of all broadcast licenses are held by minorities. *See Fullilove*, 448 U.S. at 521. The awarding of minority enhancement credits is thus a legitimate race-based policy confined to the specific purposes of remedying

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[18] Indeed, the FCC Review Board has refused to award a special credit to a minority applicant for proposing to broadcast minority-oriented programming, holding that this would be premised on an invidious racial stereotyping of the very character derived by the majority panel in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). *Suburbanaire, Inc.*, 104 F.C.C.2d 909 (Rev. Bd. 1986).

The Commission is sensitive to questions of stereotyping and stigma. It awards credit for minority ownership without regard to the market demographics to be served, correctly recognizing that minorities can succeed in diversifying information provided to nonminorities just as well as they can succeed in diversifying information provided to nonminorities. *See Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264-65 (1982), *aff'd sub nom., West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

past societal discrimination and furthering the First Amendment interest in promoting diversity in broadcasting.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE NATIONAL BAR ASSOCIATION AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it is constitutionally permissible for the Federal Communications Commission to utilize as criteria for selection among qualified applicants to become broadcast licensees, factors such as diversification of control of media of mass communications, standards of station operations, and enhancement credits to include broadcast experience, female ownership, minority ownership, local residence, past broadcast experience; and program service, efficient use of frequency and character considerations in its comparative hearing process to select from among competing applicants that one best calculated to operate in the public interest?

2. Whether the Government may require a minority broadcast applicant to make an advanced showing of program predilections of judgments as a tailoring device to qualify for the minority ownership enhancement policy without violating the First Amendment?

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INTEREST OF AMICUS CURIAE

The National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. Since its founding, the National Bar Association has been involved in promoting civil rights activities in an effort to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy, particularly as it relates to promoting minority employment in and ownership of broadcast facilities.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented by the Respondent, the Federal Communications Commission.

SUMMARY OF ARGUMENT

The FCC's minority enhancement credit policy is more narrowly tailored than the admissions program approved by the Court in *Bakke*. Petitioners have no basis to complain of unequal treatment under the Fifth Amendment.

The enhancement credit stems from the compelling governmental interest of furthering the widest dissemination of information from diverse and antagonistic sources through minority ownership. This clearly is a constitutionally permissible goal for a federal agency charged with furthering the widest dissemination of information and ideas from antagonistic sources. Diversity of ideas or programming, though not a specif-

ically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. Thus, in arguing that the FCC must be accorded the right to select those broadcast licensees who will contribute to the diversity of programming, Amicus invokes a countervailing constitutional interest: that of the First Amendment, and the goals of the Commerce Clause. In this light, the FCC must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its First Amendment mandate, and the Commerce Clause. In pursuit of a misguided goal of enjoining the FCC from ever considering the race of any applicant, Petitioner fails to recognize that a federal agency charged with distribution of a scarce public resource has a substantial interest that legitimately may be served by a properly devised program involving the competitive consideration of race and ethnic origin. Therefore, the principle enunciated in *Bakke* and *Johnson* allowing race to be used as a plus factor, among others, should logically be extended to the facts of the case *sub judice*.

ARGUMENT

I. DEVELOPMENT OF PUBLIC INTEREST MANDATE TO ENCOURAGE MINORITY PARTICIPATION IN BROADCAST OWNERSHIP

A. The Minority Enhancement Policy is an Outgrowth of the Policy Statement on Comparative Broadcast Hearings

As part of its public interest mandate, the Federal Communications Commission ("FCC") has historically recognized that diversity in the control of the broadcast spectrum constitutes a primary objective of the licensing scheme. *See, Policy Statement on Comparative*

Broadcast Hearings, 1 FCC 2d 393 (1965) ("*1965 Policy Statement*"); Communications Act of 1934, as amended, 47 U.S.C. § 309(a)(1982). In the *1965 Policy Statement*, the FCC adopted guidelines for choosing between competing applicants for available frequencies. These guidelines applied to a process—commonly referred to as the "comparative hearing process"—and are guided by two fundamental objectives. The first is to provide the best practicable service to the public, and the second is to promote diversity in the control of the mass media. *Id.* at 394. The *1965 Policy Statement* details six specific criteria to be considered in the disposition of comparative hearing proceedings:

> (i) *Diversification of control of the media of mass communications.* Diversification of ownership is a "primary objective in the licensing scheme." This criterion looks at the number of other mass communication outlets held by a candidate - both those in the community proposed to be served, and those outside of the relevant service area.
>
> (ii) *Full-time participation in station operations by owners.* This policy stems from the tenet that there is a "likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station." The Administrative Law Judge determines whether, given the specific roles the candidates propose to occupy, the candi-

dates will affect policy that governs and guides the management of the broadcast facility. Credit under this criterion is enhanced where an applicant demonstrates that its principals 1) reside in the community of license, or within the service area of the proposed facility, 2) have past broadcast experience, and 3) are actively involved in community affairs. This criterion has been subsequently expanded so that enhancement credit can also be granted for minority ownership. *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) (*Minority Ownership Policy Statement*).

(iii) *Proposed Program Service.* "Substantial differences" in proportions of time allocated to different types of programs "will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service."

(iv) *Past broadcast record.* A past broadcast record of average performance is disregarded since average performance is expected. The Administrative Law Judge will only look to past records to determine the following: unusual attention to the public's needs, or a significant failure to carry out representations made to the Commission.

(v) *Efficient use of frequency.* This factor is only considered when a competing applicant proposes an operation which, for one

or more engineering reasons, would be more efficient than that utilized by a competing candidate.

(vi) *Character.* Character deficiencies may warrant demerits to a competing application. Significant deficiencies can warrant disqualification.

See id. at 394-99. In asserting that full-time involvement in station operations by licensees and "maximum diffusion of communications" were the two primary objectives needed for a positive decision to grant a license or construction permit, the FCC acknowledged the importance of the Supreme Court's premise that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* at 394 n.4 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

In the *1965 Policy Statement*, the Commission acknowledges the significant value of the broadcast spectrum, stating that "radio and television broadcast stations play an important role in providing news and opinion. . .[.] [T]hat government should not create such a concentration is equally apparent, and well-established." *1965 Policy Statement*, supra, at 394, n.4.[1] Although the importance of diversity of programming has been recognized by the FCC in its *1965 Policy Statement*, it was shortly after the passage of the Communications Act of 1934 that Blacks themselves began

[1] See also, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, *cert. denied* 342 U.S. 830 (1951).

to realize the importance of broadcast ownership.[2] Available scholarly sources indicate that no American broadcast station was owned by a Black until around 1948.[3]

B. The FCC Has Historically Recognized The Importance of Minority Ownership As A Vehicle to Further Programming Diversity

It was in 1946 that the FCC acknowledged the significance of broadcasting to minorities in stating that "the American system of broadcasting must serve significant minorities among our population." *Public Responsibility of Broadcast Licensees (The Blue Book)*, 15 (March 7, 1946). Nearly thirty years later, after the FCC had granted thousands of licenses, minorities continued to remain substantially underrepresented in the broadcast industry. The concept of minority ownership, however, did surface in various spectrum allocation proceedings as minorities sought to influence public policy by participating in FCC proceedings in order to enhance their opportunity to become broadcast licensees.

---

[2] See, Smith, "The Black Bar Association and Civil Rights," 15 *Creighton L. Rev.*, 651, 667 n.61 (1982); Smith, "For a Strong Howard University Press," Vol. 121, Part 21, Cong. Rec. 27,790, 94th Cong., 1st Sess. (Sept. 5, 1975).

[3] As one scholar noted, "It is difficult to determine exactly when black radio moved into [the ownership] stage of development. It is known that blacks were owners of radio stations in the 1950's. Station WSOK in Nashville was reported to have had several black shareholders (exact date unknown). In 1950, newspaper accounts said that a 'powerful Negro station' (50,000 watts) in New Orleans was going to be serving the South. It was recently reported that a black-owned station went on the air in Kansas City in 1950, and that another station may actually have become black-owned as early as 1948." R. D. Bachman, *Dynamics of Black Radio* 16 (1977) (citations omitted).

In a 1973 spectrum allocation proceeding, the FCC had conceded that "the promotion of minority group ownership of broadcast facilities [was] a socially desirable end." *Amendment of Part 73 of the Commission's Rules*, 39 FCC 2d 645, 677-78 (1973).

The dearth of minority ownership of broadcast stations troubled many, including the FCC Chairman Richard E. Wiley and Commissioner Benjamin L. Hooks, whose concerns were the genesis of the historic Minority Ownership Conference sponsored by the FCC on April 24-25, 1977. *See* Smith, "Toward Minority Visibility in Telecommunications Ownership," 12 *Nat'l B. L. J.* vii-xi (1983); *FCC Report on Minority Ownership in Broadcasting*, May 17, 1978 ("*1978 Minority Taskforce Report*"). The text from the Report demonstrates the FCC's intent in encouraging minority ownership:

> Minorities should be fairly represented in the broadcast industry of a society which mandates an unrestricted flow of diverse ideas and equal opportunity for all. Diversity of ideas and viewpoints is vital to a free society. Indeed, the promotion of greater diversification in the media has been recognized as socially desirable by the FCC as well as the courts.

1978 Minority Taskforce Report at ii. Moreover, the *Taskforce Report* specifically acknowledges the general public value of diverse views in stating that:

> [u]nless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and *the larger non-*

> *minority audience will be deprived of the views of minorities.*

Id. at i (emphasis added). *See also* Lee, *The Supreme Court And The Right To Receive Expression*, 1987 Sup. Ct. Rev. 303, 306.

The FCC also reported on financial barriers to entry, and noted that "[a]nswers to all the problems confronting potential minority broadcasters will be found by hard and imaginative development of solutions by the potential minority broadcasters and the *private and governmental institutions confronting the issues.*" *Id.* at 2 (emphasis added).

Exhaustive measures to ensure the legitimacy of the FCC's minority ownership policies did not end in 1978. In 1982, the FCC issued a second minority ownership report based on a conference at the Commission on September 28, 1981. *See Advisory Committee on Alternative Financing Opportunities in Telecommunications*, (May 27, 1982) ("*1982 Conference Report*"). The *1982 Conference Report* makes several recommendations for eradicating the economic barriers typically confronting potential minority broadcasters. Moreover, the *1982 Conference Report* echoes the themes of the *1978 Minority Taskforce Report* by advising the FCC that "in structuring entry and establishing licensing procedures of developing technologies, [the FCC] must continually consider whether its proposed policies will encourage or preclude minority entrants." *1982 Conference Report*, *supra*. (Introduction). The FCC's commitment to promoting minority ownership of broadcast facilities was affirmed by FCC Chairman Mark Fowler in 1981, when he declared that "we at the FCC. . . will not. . . turn back the gains made by minorities in this country. . . will not frustrate the gains made by minorities in telecommunications. . . ." FCC Release, No. 003550, at 3 (Sept. 24, 1981).

Not only has the FCC itself compiled research and data pertaining to the significance of minority ownership of broadcast facilities, and methods for attaining this policy objective, Congress has pursued information on the minority ownership policies and has granted its approval of the agency's actions, also. In 1982, Congress expressed approval of the FCC policy of awarding minority enhancement credit in the lottery scheme, stating that:

> [i]t is the firm intent of the conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system.

See H.R. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982). In 1987, Congress reaffirmed its strong support for the minority enhancement policy, by prohibiting repeal or reconsideration of the policy by the FCC. In the statute, Congress specifically provides that:

> none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and . . . to expand minority. . . ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 and 69 FCC 2d 1591, as amended 52 RR 2d 1313 (1982) and *Mid-*

> *Florida Television Corp.*, 60 FCC 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending conclusion of the inquiry. . . .

See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). *See also* H.R. Rep. 498, 100th Cong., 1st Sess. 504 (1987); Pub. L. No. 100-459, 102 Stat. 2216 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

There is ample legislative history and majoritarian affirmation to support the FCC's determination that minority ownership is a means to achieve diversity in programming and viewpoints as a legitimate means or end of the Commerce Clause. *See* U.S. Const. art. I, § 8; *see also Gibbons v. Ogden*, 9 Wheat. 1 (1824). In 1983, Congresswoman Cardiss Collins stated:

> if we do not take action to correct the deliberate and systematic invisibility of minorities in the media, we will not play a meaningful role in the way American society receives information about itself and the world.

Minority Participation in the Media: Hearing Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983) at 132. The late Congressman Mickey Leland specifically reflected on Congress' interest in preserving the FCC's minority ownership policies in stating:

> It is imperative that, to the extent we provide for license certainty for broadcast licenses, we

> do not exclude the possibility of greater minority participation as owners in the industry. For that reason, I firmly believe that any new licenses created by the FCC through drop ins radio or television or, by revocations or denials of existing licensees should, to the maximum extent possible, be made available to qualified minority applicants. . . . Whatever means we use, the essential point is that minority ownership is at an abysmally low level and must increase if the industry is to live up to its promise of service to the entire community.

Id. at 133. *See also Parity for Minorities in the Media-Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Minority-Owned Broadcast Stations - Hearing on H.R. 5373 Before Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986).

More recently, the Senate Subcommittee on Communications conducted a hearing to further examine the FCC's minority ownership policies. *See Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Common Commerce*, 101st Cong., 1st Sess. (1989). The Senate hearing demonstrates Congress' continuing interest in preserving the FCC's minority enhancement policy. As noted by Subcommittee Chairman, Senator Daniel K. Inouye, Congress' current interest with respect to the policy is to "demonstrate that minority. . .ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves[,] [and] [Congress]

need[s] to consider what, if any, changes need to be made in the policies or their implementation to improve their effectiveness." *Id.* at 4.[4]

C. The Minority Qualitative Enhancement Factor Is Consistent With The Mandate to Encourage Broadcast Diversity In The Public Interest

As this Court articulated in *Associated Press v. United States*, 323 U.S. 1 at 20, the importance of diversity of approach and viewpoint in broadcasting is well-entrenched as an important public interest goal. *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978)("*FCC v. NCCB*"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). The District of Columbia Circuit has consistently given credence to specific FCC policies that would effectuate the public interest of program diversity without regulating content of broadcast programming. Thus, as discussed, *infra*, policies which diversify ownership of broadcast facilities have become an instrumental device in encouraging diversity of programming content while minimizing governmental intrusion in broadcast content, thereby preserving First Amendment freedoms.[5]

In *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified* 463 F.2d 822 (D.C. Cir. 1972), the court acknowledged that diversity of own-

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[4] *See also Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 136-37 (1989) (Testimony of Marilyn Fife, PhD., Temple University).

[5] As this Court noted in *FCC v. NCCB*, "[d]iversity and its effects are. . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." 436 U.S. at 796-97.

ership can assist the FCC in effectuating its public interest goals, and stated that the Commission "simply cannot make a valued public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by a grant of one or another of the applications before it." 447 F.2d at 1213 n.36. The court added, as diversity of ownership is significant, so too it is important that "hitherto *silent minorities*. . . be given some stake in and chance to broadcast on [ ] radio and television frequencies." *Id.* (emphasis added).

The issue of minority underrepresentation in the broadcast industry has been directly addressed by the FCC and the court. See generally Wilson, "Minority and Gender Enhancements: A Necessary and Valid Means to Achieve Diversity In The Broadcast Marketplace," 40 *Fed. Comm. L. J.* 89 (1988). Mechanisms have been designed by the courts and implemented by the FCC to spawn greater participation in broadcasting by minority groups in furtherance of the public interest goal of enhancing the public's exposure to programming that is comprised of diverse group viewpoints. *See, e.g., Garrett v. FCC*, 513 F.2d 1056, 1061, 1063 (D.C. Cir. 1976). In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the significance of minority ownership was dealt with directly with respect to its necessity in furtherance of the public interest and the First Amendment considerations that mandate it. As acknowledged in *TV 9, Inc.*, "[t]he thrust of the public interest opens to the Commission wide discretion to consider factors which do not find expression in constitutional law[,] . . . [h]owever exclusive the public interest may be it has reality[;] [i]t is a broad concept to be given realistic

content." *Id.* at 936. The District of Columbia Circuit looked to the Supreme Court's acknowledgement of the FCC's power to enforce the public interest mandate which served as the court's foundation for the minority enhancement policy.

> The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

Id. at 938. [footnote omitted]. *West Michigan*, 735 F.2d 601 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1027 (1985) further establishes minority ownership as a legitimate policy objective and a vital part of the FCC's public interest mandate that must be recognized regardless of the minority make-up of a station's local population. *Id.* at 611. The policy enunciated in *TV 9, Inc.* was clarified even more in *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975), wherein the court rejected the assertion that a grant of qualitative enhancement credit due to minority status compels advance demonstration of the intent to broadcast minority programming. The court held that "[t]he entire thrust of *TV 9, Inc.* is that Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the Black citizenry and that 'reasonable expectation,' without advance demonstration," gives them relevance." *Id.* at 1063, *citing TV 9, Inc.*, 495 F.2d at 938. [footnotes omitted.]

In sum, the minority qualitative enhancement factor is consistent with the public interest standard enunciated by the Court, the FCC and Congress to encourage broadcast diversity.

II. AN FCC DECISION THAT IS REASONABLE AND BASED UPON CONSIDERATION OF PERMISSIBLE FACTORS SHOULD BE ACCORDED DEFERENCE

Since Congress gave the FCC broad discretion in granting broadcast licenses, courts have a limited standard of review of such FCC decisions. Section 402 of the Communications Act provides that courts shall hear appeals as prescribed by Section 706 of Title 5. 47 U.S.C. § 402(g) (1989). Therefore, in this case, as in all appeals of agency decisions, the courts have limited judicial review as the Administrative Procedure Act states, a "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations or short of statutory right." 5 U.S.C. § 706(2)(C) (1982).

This standard of review restricts the Court's review of FCC decisions, unless the enhancement factors of the comparative license policy is in excess of the authority of the Communications Act of 1934, as amended. Amicus submits that it is not. *See Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 354 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). The court is not permitted to conduct a *de novo* comparative analysis of broadcast applications, or to second-guess the FCC's evaluation of the proposed service. *Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756, 763 (D.C. Cir. 1983).

The courts emphasized that their review of comparative hearing proceedings is limited to ensuring that

the agency has engaged in reasoned decision-making that is based upon the FCC's announced policies. In 1983, the District of Columbia Circuit explained its need to "proceed cautiously" when reviewing a comparative hearing decision, stating:

> It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority, that it has followed its own procedural rules and regulations, that its findings of fact are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions, do not deviate greatly from past pronouncement without sufficient explanation, and that in general it has engaged in reasoned decision-making. . . *It is not our judicial job to direct the Commission on how to run the comparative hearing process.* . . .

Victor Broadcasting, Inc., 722 F.2d at 760 (citing *Miner v. FCC*, 663 F.2d 152, 155 (D.C. Cir. 1980)) (emphasis added).

When the FCC's action is reasonable and based on the consideration of permissible factors, courts have declined to substitute their views for the FCC's views and have given deference to the FCC's expert judgment regarding how the public's interest is best served. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-18 (1943); *Victor Broadcasting, Inc.*, 722 F.2d at 760. Some, who command much respect, have expressly stated that they give more deference to FCC comparative decisions because those decisions are based upon " 'judgmental and predictive' conclusions." *Black Citizens for a Fair Media v. FCC*, 719

F.2d 407, 417 (D.C. Cir. 1983)(Bork, J.). *See also Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

In the case before the court, the FCC Review Board determined that Rainbow had quantitative and qualitative advantages over its competitors, Winter Park and Metro. Neither applicant received an enhancement credit for comparative coverage; but, Rainbow prevailed in the integration of ownership and management category. Metro received 79.2% integration credit for the full-time participation of four stockholders and 19.8% for the part-time participation of one stockholder as general manager. By comparison, Rainbow received 90% full-time integration credit for participation as a general manager. Therefore, Metro and Rainbow were awarded substantial enhancements over Winter Park.

At that point, the Review Board properly concluded that since Winter Park lacked full-time integration and sufficient qualitative enhancements, further consideration of its application was unnecessary. In addition, Rainbow's 10.8% quantitative advantage over Metro was decisional as a matter of evidentiary weight. However, the Board did conduct a factual qualitative comparison of Metro and Rainbow and decided that Rainbow's service would be qualitatively superior to Metro's proposed service. Rainbow received a substantial minority enhancement for its proposed 90% minority (Hispanic) participation and it is here emphasized that *Metro received 19.8% credit for its female participation.*

Rainbow also received an enhancement credit for broadcast experience, since one of its principals had 85% past broadcast experience as compared to Metro principals' 19.8% past experience. Moreover, Rainbow

proposed 5% female ownership while Metro claimed none. Finally, Metro received only a moderate enhancement credit for the local and service area residence and civic participation of its three principals. The Review Board determined that based upon Rainbow's quantitative and qualitative edge, Rainbow would best serve the public interest. Amicus contends that the FCC's decision to award the license to Rainbow is supported by substantial evidence and that limits the scope of judicial review. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 417.

III. THE FACT THAT PETITIONER LOST TO RAINBOW IN THE COMPARATIVE HEARING IS NOT INVIDIOUS DISCRIMINATION BECAUSE THE FCC APPLIES MULTIPLE FACTORS IN THE AWARD OF BROADCAST LICENSES

As discussed in Section I of this Brief, the comparative hearing process involves a consideration and review of several factors including: diversification of control of the media, integration of ownership and management, proposed program service, past broadcast record, efficient use of the frequency and character. Petitioner argues, however, that the minority enhancement credit is an unconstitutional factor, notwithstanding the fact that overwhelming evidence demonstrates that an applicant's minority status is not and has never been the sole basis for granting a license. Amicus submits that the Petitioner's claim is without merit because the minority enhancement credit is consistent with the courts' statements in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

It is useful to bear in mind what this case is not. The Court is not asked to order parties to suffer the consequences of an agreement that they had no role in adopting. *See Firefighters v. Scotts*, 467 U.S. 561, 575 (1984); *Martin v. Wilks*, 109 S.Ct. 2180 (1989). This is not one in which a party to a collective-bargaining agreement has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. *Cf. Teamsters v. United States*, 431 U.S. 324, 350, 352 (1977). The Court is not presented with the occasion to resolve whether a white worker may be required to relinquish his job to accommodate the hiring of a black worker. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Also, there has been no court order to achieve racial balance which might require the Court to reflect upon the existence of judicial power to impose obligations on parties not proved to have committed a wrong. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Further, the Court is not called upon to determine whether a state or local government's race-conscious program to remedy societal discrimination is narrowly tailored so that it allows for case-by-case consideration of applicants to ensure that each minority has in fact suffered from the effects of past discrimination, and to see if the program is patterned so that it minimizes the burden on nonminorities, so that innocent people are not asked to shoulder an undue share of the cost of remedying past discrimination. *City of Richmond v. J.A. Croson*, 109 S.Ct. 706 (1989). Resolution of this case is best guided by the Court's pronouncements in the *Bakke* and *Johnson* decisions.

In *Bakke*, a California medical school special admissions program which set aside sixteen of one hundred positions in the class for minority applicants was declared unconstitutional. Justice Powell summarized the Court's objection to giving students a preference based solely upon race stating, "[t]he diversity that furthers a compelling state interest encompasses a broad array of qualifications and characteristics of which racial or ethnic origin is but a single, although important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." 438 U.S. at 315. The comparative hearing process and the facts before the Court satisfy the *Bakke* test.

Justice Powell compared the University of California's program to the admissions program of Harvard College which included high school records, test scores, geographical origin and race among its admissions criteria. Justice Powell explained that the Harvard program was dissimilar to the University of California's program because:

> race and ethnic background may be deemed a 'plus' in a [Harvard] applicant's file, yet it does not insulate the individual from comparison with all other candidates. . . . The applicant who loses out on the one last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for the seat simply because he was not the right color or the wrong surname. It would mean only that his combined qualifications, which may have included similar non-objective factors, did not outweigh those of the other applicant.

Id. at 318.

Recently, the Court decided that a similar agency plan that required women to compete with all other qualified applicants, but gave a preference to women, was constitutionally permissible. *Johnson*, 480 U.S. at 637-40. The plan included consideration of the applicant's sex as well as low turnover rates, the type of labor, and the number of positions within a job category in promotion and hiring decisions. *Id.* at 622. In *Johnson*, seven people applied for a position. Petitioner Johnson, a male, filed a discrimination complaint when a woman was selected. Rejecting petitioner's claim, the Court concluded that the agency's plan neither unnecessarily trammeled the rights of male employees nor created an absolute bar to their advancement. The Court stated that "[n]o persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* at 638. The FCC's comparative hearing factors, including the minority ownership enhancement policy on review before the Court, follow the same nondiscriminatory model upheld in *Johnson*.

The minority enhancement credit is one diversity plus factor among several comparative factors by which the FCC selects licensees. *See, e.g., Gainesville Media, Inc.*, 70 FCC 2d 807, 184 n.15 (1978); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 46 (1977). Unlike the University of California's program, "[t]he FCC comparative process. . .explicitly provides for examination of a wide variety of traits to assess an applicant's potential for increasing diversity and quality programming." *West Michigan Broadcasting Company v. FCC*, 735 F.2d 601, 615 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Therefore, the FCC's policy of taking race into account

in the award of broadcast licenses, among other factors, "easily passes constitutional muster." *Id.* at 613.

The FCC's policy is similar to the Harvard program which the Supreme Court approved. In both instances, minority status is only one of several factors which decision-makers review to choose applicants. Neither the Harvard program nor the *TV 9, Inc.* minority factor adopts a quota system. In *TV 9, Inc.* when Judge Fahy asserted the need for a minority enhancement, he emphasized that "no quota system is being recommended or required." 495 F.2d at 941. Likewise, the originators of the Harvard program noted that no "target-quotas" were intended. 438 U.S. at 324. Thus, neither of these programs unnecessarily trammels upon the rights of whites or creates a bar to their advancement since the FCC could select any qualified applicant. *United Steelworkers of America*, 443 U.S. at 208. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974). And Petitioner, who took advantage of an enhancement factor (female enhancement credit) himself, cannot here legitimately claim invidious discrimination because he lost a close competitive contest to a minority applicant.

IV. THE MINORITY ENHANCEMENT POLICY IS NARROWLY TAILORED AS STRUCTURED, AND ANY FURTHER TAILORING ENCROACHES ON THE FIRST AMENDMENT

A critical question posed by the case, *sub judice*, is whether the Constitution prohibits a federal administrative agency from exercising its broad delegation of power by taking race into account to promote First Amendment concerns.

The FCC's minority ownership policy and, in particular, the award of enhancement credit for minorities

in the comparative hearing process, primarily serves the compelling governmental interest of advancing First Amendment concerns. The comparative hearing process and its attendant minority enhancement policy is narrowly tailored to achieve the compelling governmental interest. It therefore promotes First Amendment concerns through diversity of ownership, with an expectation of diversity of programming, without advance demonstration, *and avoids direct intrusion into First Amendment rights.* The minority enhancement policy does not create a *numerus clausus* because race is one of several factors to be considered rather than a decisive factor in and of itself.[6]

Amicus acknowledges that the promotion of First Amendment concerns in the academic community is the only other state interest heretofore identified in a Supreme Court opinion and upheld as sufficiently compelling to support a race-conscious policy. *Wygant v. Jackson Board of Education*, 476 U.S. at 286 (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311-15). However, the Court in *Wygant* acknowledged that its previous decisions did not "necessarily foreclose [ ] the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on [ ] to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Id.* at 286 (O'Connor, J., concurring).[7]

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[6] The minority enhancement becomes relevant after the FCC concludes that there are no significant differences in the quantitative aspects of two competing applicant's integration proposals. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982).

[7] It can not be overemphasized that the Commission has never,

Amicus argues that the case *sub judice* provides the factual basis for the logical extension of the principles enunciated in *Bakke*. The promotion of First Amendment concerns in the broadcast arena is a sufficiently compelling governmental interest to justify regulations which invite greater participation by minorities, who are substantially underrepresented in the ownership and management of broadcast facilities.[8] As in the educational setting, diversity of ideas or viewpoints is the pivotal issue in the case *sub judice*.

The Courts, Congress and the FCC have endorsed the principle that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the public interest." *See Associated Press v. United States*, 326 U.S. at 20 (1945); H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 40 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News. 2261; S. Rep. No. 100-182, 100 Cong., 1st Sess. 76 (1987); *1965 Policy Statement*, 1 FCC 2d at 394; *Minority Ownership Policy Statement*, 68 FCC 2d 979 (1978); *cf. FCC v. NCCB*, 436 U.S. at 795; *Greater Boston Television Corp. v. FCC*, 444 F.2d at 860 (FCC should seek out "as licensees those who would speak out with fresh voices, [and] would most naturally...

in form or substance, classified its minority ownership policy as tantamount to an affirmative action program. Brief for FCC, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), at 28-30. However, the principle of inclusion in *Bakke* is relevant and applicable to the case at the bar.

[8] According to the most recent census figures, minorities constitute about 23.5 percent of the population. However, only 2.1 percent of radio and television stations are minority owned and controlled, according to a National Association of Broadcasters study done in 1987. See "Minority Owned and Controlled Broadcast Stations," National Ass'n of Broadcasters (1987).

expand diversity of approach and viewpoint"); *Citizens Communications Center*, 447 F.2d at 1213 n.36.

As First Amendment concerns relate to the FCC's minority ownership policy, and in particular the comparative hearing process, both the courts and the FCC have determined that diversity in broadcast programming is a compelling governmental policy. *Accord* brief for FCC, on appeal from a decision and Order of FCC, *West Michigan Broadcasting Co.*, supra, at 19 n.16 (citations omitted) (FCC General Counsel Bruce Fein). Further the minority ownership policy increases ownership diversity which, in turn, leads to increased program of diversity. *See* Brief for FCC before this court (Docket 89-700), *Astroline Communications Co. v. Shurburg Broadcasting of Hartford, Inc.*, at 24, citing *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990)("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' expressed approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses"). In *West Michigan Broadcasting Co.*, the court concluded that promotion of diversity was a sufficiently important governmental interest to warrant a race-conscious policy. 735 F.2d at 614-15. In *TV 9, Inc.*, the court noted that the policy acknowledged the FCC's First Amendment mandate of promoting diversity of ownership of broadcast stations along with the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.*, 495 F.2d at 937.

Congress has also recognized the compelling governmental interest of furthering the First Amendment

concerns of the FCC's minority ownership policy. In enacting the 1982 lottery statute, Congress sanctioned the means chosen as a proper vehicle to achieve diversity, *see* H.R. Rep. No. 765 at 44, and in three subsequent appropriations acts, it mandated that the FCC continue its minority ownership policy premised on the compelling governmental interest of furthering the First Amendment. *See* Pub. L. No. 100-202, 101 Stat. 1329-31 (1987)(Pet. App. 162a):

> The Congress has expressed its support of such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 100-182 at 76, citing 47 U.S.C. § 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37-44 (1982); Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

The Court has implicitly recognized that the FCC through other regulation can seek to achieve its First Amendment mandate. Consider the case of *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n.7 (1976). There, the Court opined that the FCC's equal employment opportunity rules were justified "as necessary to enable the FCC to satisfy its obligation under the Communications Act. . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Id.* Similarly, the FCC has attempted to meet its public interest mandate through policies that invite greater participation by minorities

who are substantially underrepresented in the ownership and management of broadcast facilities. *See, e.g., Minority Ownership Policy Statement*, 68 FCC 2d at 980-81; *Waters Broadcast Corp.*, 91 FCC 2d 1260, 1264 (1982); *Mid-Florida Television Corp.*, 69 FCC 2d 203 (1981); *Horne Industries, Inc.*, 94 FCC 2d 815, 822-24 (Rev. Bd. 1983), *rev. denied*, 56 Radio Reg. 2d (P&F) 665 (1984).

The FCC *Minority Ownership Policy Statement, supra*, outlined the diversity-related basis for its minority policies:

> Adequate representation of minority viewpoint in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming. . . . In addition, an increase in minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

Minority Ownership Policy Statement, supra, 68 FCC 2d at 980-81 (citing *1978 Minority Taskforce Report*). Therefore, giving enhancement credit for minorities in the comparative hearing process can be justified as a compelling governmental interest implicating First Amendment concerns.

Turning to the issue of narrow tailoring, the constitutional test seems to be different when the gov-

ernment's justification for a race-conscious program is the promotion of diversity rather than the remedy of past discrimination.[9] In the First Amendment context, Justice Powell in *Bakke* suggested that a program is narrowly tailored if each applicant receives individualized consideration. *See Bakke*, 438 U.S. at 318 & n.52; *Cf. Croson*, 109 S.Ct. 728-29. The Court in *Bakke* required no more than individualized considerations with respect to narrow tailoring, even rejecting the argument that an admission program which considers race only as one factor is simply a "subtle and more sophisticated"—but no less effective—means of according racial preference." *Id.*

Even assuming *arguendo*, that the narrow tailoring in *Bakke* is deficient in light of recent Supreme Court decisions, the Court could reasonably find that the FCC's comparative hearing policy is *more* narrowly tailored than required by the *Bakke* decision. The FCC's minority enhancement credit accounts for only one fac-

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[9] When remedying past discrimination is the justification for the government's race-conscious programs, the Court has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. *See Croson*, 109 S.Ct. at 728; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *id.* at 511 (Powell, J.). Amicus points out that the justification of remedying past discrimination is not the specific goal of the minority ownership policy. The FCC, however, has for years followed policies of encouraging diversity of employment practices of broadcast licensees. *See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969) (Regulations sought to ensure that broadcast licensees did not discriminate against minorities in employment practices); *see also Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976).

tor in the overall comparative evaluation, and the impact on nonminorities is minor compared to the harsh layoff provisions in *Wygant*. Therefore, the analysis employed in *Wygant* does not apply to the FCC's minority enhancement policy.

In short, the FCC's policy of awarding a qualitative enhancement credit for minority status in the comparative hearing process strikes a reasonable balance between First Amendment concerns of diversity while minimizing government intrusion into broadcast program content and the Fifth Amendment's equal protection component.[10] The minority enhancement credit operates only to enhance qualitatively the quantitative credit given for participation in station management by the station's owners.[11] Amicus submits the compar-

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[10] "[I]n our present society, race is not always irrelevant to sound governmental decision-making." *Wygant*, 476 U.S. at 314 & n.7 (Stevens, J., dissenting) ("As Justice Marshall explains, although the Court's path in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), is tortuous, the path at least reveals that race consciousness does not automatically violate the Equal Protection Clause. In those opinions, only two Justices of the Court suggested that race-conscious governmental efforts were inherently unconstitutional. *See id.* at 522 (Stewart J., dissenting, joined by Rehnquist, J.). *Id.* at 548 (Stevens, J., dissenting) ("Unlike Mr. Justice Stewart and Mr. Justice Rehnquist, . . . I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race").

[11] *See WHW Enterprises, Inc.*, 89 FCC 2d at 817 (minority preference becomes significant only after FCC concludes that no significant differences in quantitative aspects of competing applicants' integration proposals exist). Further narrow tailoring can be found in the FCC's decision not to award credit unless the owner will "devote substantial amounts of time on a daily basis" to the station management. *1965 Policy Statement*, 1 FCC 2d at

ative hearing process is narrowly tailored in that it avoids a race-based allocation of benefits according to a fixed, unyielding percentage or quota. See *Fullilove*, 448 U.S. at 473 (No "inflexible percentages solely based on race or ethnicity"); *Bakke*, 438 U.S. at 316 ("assignment of a fixed number of places to a minority group"); *Croson*, 109 S.Ct. at 728 (constitutionally infirm plan relied on "a rigid numerical quota" which "cannot be said to be narrowly tailored to any goal").

In summary, the FCC's minority enhancement policy is as narrowly tailored as the admission's program approved by the Court in *Bakke*. As in *Bakke*, the applicant did not lose out on the last available seat [grant of broadcast license] simply on the basis of race. Hence, Metro's claim of violation of the Fifth Amendment is without basis and should fail

CONCLUSION

For the foregoing reasons, the decision by the District of Columbia Circuit should be affirmed.

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395. The above-mentioned structural-type policies avoid FCC's supervision and oversight of the content of broadcast programming and such an approach has been endorsed by the Court in analogous contexts. *See, e.g., National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 226 (1943) ("Congress did not authorize the FCC to choose among applicants based upon their political, economic or social views. . . ."); *see also FCC v. NCCB*, 436 U.S. at 796-97 (Defining and measuring diversity is difficult without making qualitative judgments objectionable on both First Amendment and policy grounds). Further, the impact on innocent parties is minor because the minority enhancement credit accounts for only one factor in an overall comparative analysis.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. AND CONGRESSMAN EDOLPHUS TOWNS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

This brief is submitted by the National Association of Black Owned Broadcasters, Inc. ("NABOB") and Congressman Edolphus Towns as amici curiae. Amici have secured the consent of each party to the filing of this brief. Amici support the position of respondent in this case and urge affirmance of the decision below.

NABOB is the trade association representing the interests of the 180 commercial radio and 18 commercial tel-

evision stations across the country owned by African Americans. NABOB has two principal objectives: to increase the number of African American owners of radio and television stations, and to improve the business climate in which African American owned radio and television stations operate.

Some of NABOB's members have acquired stations through the comparative hearing enhancement credit policy and other members may acquire stations pursuant to the comparative hearing enhancement credit policy in the future if that policy is found to be constitutional by the Court. Therefore, NABOB and its members have a very significant interest in the outcome of this proceeding and can provide to the Court the perspective of many potential and past beneficiaries of the Federal Communications Commission's policy at issue here.

The Honorable Edolphus Towns is a member of the United States House of Representatives. He has represented the people of the Eleventh Congressional District of the State of New York since 1983. As a member of the Congressional Black Caucus, Congressman Towns is deeply involved with the legislative issues which affect traditionally underrepresented groups. He is currently a member of two committees which have legislative and oversight jurisdiction over the Federal Communications Commission: the Committee on Government Operations and the Committee on Energy and Commerce. Broadcast ownership policies which affect minority groups nationally will affect the opportunities available to the predominately African American and Hispanic American constituency which he represents.

STATEMENT OF THE CASE

In the instant case, after a comparative hearing the Federal Communications Commission ("FCC") granted the application of Rainbow Broadcasting Company ("Rainbow") for a construction permit to build a new UHF television station to serve the Orlando, Florida metropolitan area and denied the competing application of Metro Broadcasting, Inc. ("Metro").

In comparing the Rainbow and Metro applications, the FCC ruled that Rainbow's integration proposal was both quantitatively and qualitatively superior to Metro's. In particular, Rainbow was awarded a substantial qualitative preference for minority participation by 90% of its owners in contrast with Metro's minority credit for only 19.8% of its owners. Rainbow also received a solid preference for its broadcast experience because the past broadcast experience of Joseph Rey, an 85% owner in Rainbow, was found to be much more significant and was attached to larger ownership than that of Metro's principals having broadcast experience (19.8% full-time participation, 19.8% part-time participation). Finally, Rainbow was slightly ahead on female ownership participation (5% compared to 0%). Metro was awarded a moderate preference for superior local residence and civic participation. The FCC concluded that, overall Rainbow was qualitatively superior to Metro, and, although the qualitative comparison between the two applicant's was close, Rainbow's substantial minority preference, in conjunction with its preferences for broadcast experience and female ownership, outweighed Metro's local residence and civic participation advantage. The FCC awarded Rainbow a slight overall integration preference over Metro. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 703-04 (Rev. Bd. 1984), *rev. denied*, FCC 85-558 (released Oct. 18, 1985).[1]

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[1] Before the Commission, Metro contended *inter alia* that it should have received a "substantial" instead of a "moderate" preference for its local residence. The Commission said that even if Metro were awarded "substantial" credit for its local residence and no consideration were given for Rainbow's 5% female participation, that would not change the outcome of this proceeding. *Metro Broadcasting, Inc.*, FCC 85-558 (released October 18, 1985) (J.A. 1).

The case is now before this Court on a writ of certiorari. The issue presented is whether the FCC's congressionally mandated policy of considering minority racial status as one enhancement factor, among the many factors considered in its comparative hearing process, is constitutional.

SUMMARY OF ARGUMENT

The Federal Communications Commission's policy of awarding an enhancement credit in comparative hearings for minority applicants who will work in a management position at a new station has been mandated by the courts, mandated by Congress, and rests upon a strong factual record developed by the Congress and FCC. Because the minority enhancement credit policy is congressionally mandated, it should not be reviewed by this Court pursuant to the "strict scrutiny" standard, but should be reviewed according to the less stringent *Fullilove* standard. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, the minority enhancement credit policy is constitutional even under the strict scrutiny standard, because the policy serves a compelling interest and is narrowly tailored to serve that compelling interest.

The FCC's comparative hearing minority enhancement credit policy serves an important public interest benefit by providing an opportunity for minorities to become station owners. Minority station owners bring diversity to broadcast programming by bringing a minority perspective to programming decisions. Minorities were excluded from participation in the broadcast industry at its inception, due to both *de jure* and *de facto* discrimination, and it is unrealistic to suggest that a color-blind approach to FCC policies is sufficient to assure diverse ownership of the nation's broadcast facilities. The potential slight impact on nonminorities is not an adequate reason for eliminating the minority comparative hearing enhancement credit policy. While some nonminorities may stigmatize minorities because of the comparative hearing enhancement credit policy, minorities have lived with and continue to live with much worse stigmas, many of which have been created or fostered by the nonminority controlled media.

ARGUMENT

I. THE FEDERAL COMMUNICATIONS COMMISSION'S POLICY OF AWARDING A MINORITY ENHANCEMENT CREDIT IN COMPARATIVE HEARINGS WAS MANDATED BY THE COURTS AND CONGRESS

The Federal Communications Commission has awarded licenses through the use of comparative hearings since its creation by Congress in the Communications Act of 1934. In order to develop fair and consistent criteria for determining which applicants should be awarded licenses in comparative hearings the FCC adopted its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereinafter *Comparative Hearing Policy Statement*). The *Comparative Hearing Policy Statement* established two primary objectives which the FCC seeks to accomplish in the awarding of broadcast licenses. They are: (1) "a maximum diffusion of control of media of mass communications" and (2) "the best practicable service to the public." *Comparative Hearing Policy Statement*, 1 F.C.C.2d at 400. The *Comparative Hearing Policy Statement* identified two specific factors which the FCC would consider in determining which of two or more applicants is most likely to operate a station consistent with these objectives. These factors are:

1. Diversification of media ownership (This compares ownership of other media facilities by the applicants)

2. Integration of management and ownership (This compares involvement of the owners in the day-to-day running of the station)

Id. at 400-401.

Under "integration of management and ownership" the *Comparative Hearing Policy Statement* identified several criteria which it described as "qualitative enhancements" of the integration proposal. The qualitative enhancements identified in the *Comparative Hearing Policy Statement* are:

a. Local Residence

1. in the community of license

2. in the service area of the proposed station

b. Civic Participation

1. in the proposed city of license

2. in the service area of the proposed station

c. Past Broadcast Experience (successful employment in the broadcast industry)

d. Past Broadcast Record (exceptionally good record of ownership of other broadcast stations)

e. Efficient Use of the Frequency (a technical comparison)

Id. at 402.

However, it was the courts, not the FCC, which first recognized that the stated purposes of the Communications Act and the FCC's own *Comparative Hearing Policy Statement* required that the Commission attempt to promote racially diverse ownership of the nation's broadcast facilities. In 1973 the U.S. Court of Appeals for the District of Columbia Circuit instructed the FCC that the Communications Act required the FCC to give some "favorable consideration" to an applicant that proposes to include racial minorities among its owners who will participate in managing the station. *See TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). The Court held that:

> [W]hen minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and presentation of news.

Id. at 938 (footnotes omitted).

The Court of Appeals rejected the FCC's argument that a minority preference policy could not be adopted absent "advance assurance of superior community service attributable to such Black ownership and participation." The Court of Appeals held that a "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." *Id.*

Two years later, the Court of Appeals reaffirmed its *TV 9* decision. The Court of Appeals held that a "reasonable expectation" exists when Black owners participate in station management:

> The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that "reasonable expectation," without "advance demonstration," gives them relevance.

Garrett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (footnotes omitted).

In 1976, the Supreme Court, in *dicta*, commented on the FCC's equal opportunity rules and made a similar link between minority management and diversity of programming: "These [EEO] regulations can be justified as nec-

essary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

In 1984, the Court of Appeals addressed for the first time the constitutionality of the FCC's minority preference policy, and upheld it. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The Court of Appeals stated that, in light of congressional action, "past societal discrimination" was a sufficient basis to uphold the policy as a remedial measure. In *West Michigan* the Court of Appeals added that, even if past societal discrimination was an insufficient justification, Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), provided an alternative basis for upholding the Commission:

> Just as the FCC rests its goal of attaining diverse programming on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," Justice Powell recognized that a state university could find support in the First Amendment for the goal of attaining a diverse student body in order to expose students to the "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—[that] is widely believed to be promoted by a diverse student body." To this end the race of, for example, a black applicant could be a legitimate consideration in a school's admissions process if otherwise minorities would not be admitted in sufficient numbers "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." Clearly, under Justice Powell's approach

> the FCC's goal of bringing minority perspectives to the nation's listening audiences would reflect a substantial government interest within the FCC competence that could legitimize the use of race as a factor in evaluating permit applications.

West Michigan, 735 F.2d at 614 (citations omitted).

The Court of Appeals relied on Congress's 1982 enactment of a lottery statute which included minority preferences in the lotteries as an additional basis for upholding the constitutionality of the Commission's racial preference policy. Citing *Fullilove*, the Court held that "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615. It stated that the lottery statute "must be viewed as congressional approval of the FCC's minority ownership promotion policies." *Id.* at 616. It relied on the legislative history, which, in its view, "made clear that Congress had explicitly found that the award of significant preferences to minority-controlled broadcast entities was an appropriate way of 'remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications.' " *Id.* (quoting H.R. Conf. Rep. No. 97-765 at 43). The Court of Appeals concluded that "an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns." *Id.* The Court of Appeals in *West Michigan* held that the FCC's preference policy "easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches." *West Michigan*, 735 F.2d at 613.

II. THE STRICT SCRUTINY STANDARD OF REVIEW APPLIED IN THE *CROSON* CASE IS NOT APPROPRIATE FOR REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION'S CONGRESSIONALLY MANDATED COMPARATIVE HEARING ENHANCEMENT CREDIT POLICY

In *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), this Court articulated the principal issues it will consider when balancing interests between the Fourteenth Amendment's guarantee of equal treatment to all citizens and the use of racial preference policies to ameliorate the effects of past discrimination on the opportunities enjoyed by members of racial minority groups in our society. In writing the principal opinion for the majority in *Croson*, Justice O'Connor relied heavily upon the Court's decision in *Fullilove*. Justice O'Connor explained that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. She added, "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principals of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Thus, Justice O'Connor began from the proposition that "Congress may identify and redress the effects of society-wide discrimination." *Id.* Justice O'Connor stated that this substantially distinguished the facts of the *Croson* case from those of the *Fullilove* case:

> We do not, as Justice Marshall's dissent suggests, find in Section 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—Section 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; Section 5 is, as the dissent notes, 'a positive grant of legislative power' to Congress. Thus, our treatment of an exercise

> of Congressional power in *Fullilove* cannot be dispositive here [in *Croson*].

Croson, 109 S. Ct. at 720 (citations omitted).

Moreover, in recognition of Congress's unique power in this area, Justice O'Connor also recognized that the "strict scrutiny" standard is not appropriate for review of Congressional action with respect to race-conscious distinctions. Justice O'Connor's opinion recognized that the "strict scrutiny" standard of review is to be reserved solely for State and political subdivision legislative actions based on race. *See Id.* at 719. Thus, Justice O'Connor noted without criticism that the Court in *Fullilove* did not specify a "strict scrutiny" standard of review for Congressional action. As Justice O'Connor observed:

> The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

Id. at 717-718.

Justice O'Connor then made the following observation concerning the principal opinion in *Fullilove*:

> The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means

> for Congress to carry out its objectives within the constraints of the Due Process Clause?

Id. at 717 (citation omitted).

Thus, applying *Fullilove*, the Court's review of the Commission's implementation of the comparative hearing enhancement credit policy should focus similarly, i.e., (1) is the implementation of the policy by the Commission consistent with Congress's mandate that the Commission act to promote ownership of broadcast facilities by racial minorities, and (2) was the limited use of racial criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? Under the "strict scrutiny" standard the Court would inquire as to whether there was (1) a "compelling interest" for Congress to adopt a racial classification and (2) whether the means used to address that compelling interest were "narrowly tailored" to address that compelling interest. *See Id.* at 721. Although *Croson* did not hold that the "strict scrutiny" standard should be applied to Congressional action, as we shall demonstrate below, the minority enhancement credit policy meets the more stringent "strict scrutiny" standard of review.

III. THE CONGRESS HAS A COMPELLING INTEREST IN ENCOURAGING OWNERSHIP OF BROADCAST STATIONS BY RACIAL MINORITIES TO ENHANCE THE DIVERSITY OF BROADCAST VOICES

A. Congress has Repeatedly Determined that the Comparative Hearing Minority Enhancement Credit Policy Serves a Compelling Interest

In his decision for the majority below, Judge Edwards demonstrated convincingly that the decision below was consistent with this Court's decision in *Croson*. *See Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Judge Edwards pointed out that six Justices of this Court in *Croson* continued to regard *Fullilove*, which approved a congressionally mandated 10% minority set-

aside program, as good law. *Id.* at 354. He added that none of the opinions in *Croson* expressed any disagreement with the *Bakke* decision written by Justice Powell, where Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination. *Id.*

Judge Edwards went on to point out that in *Croson* the Court noted two crucial differences between the set-aside program upheld in *Fullilove* and the set-aside plan struck down in *Croson*. First, the City of Richmond plan at issue in *Croson* involved an "unyielding racial quota." *See Id.* Second, the plan struck down in *Croson* was adopted by a city council and the plan upheld in *Fullilove* was enacted by the Congress. *See Id.*

Judge Edwards' analysis is clearly correct. The FCC is a creation of Congress, and it derives its authority from that body. In 1982 the Congress directed the FCC to provide a minority ownership preference when it awards broadcast licenses by lottery. In so doing, the Conference Committee stated in its report:

> The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

The Conference Committee added:

> An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the num-

> ber of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

Id. at 43.

In 1987, Congress acted to prevent the FCC from repealing or altering these minority ownership policies. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *See also* H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 504 (1987). The Senate Appropriations Committee, which reported out this provision, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

Congress extended the prohibition through fiscal year 1989, *see* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. *See* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.

Moreover, not only has the Congress legislated in this area, but it also repeatedly has held hearings to monitor the FCC's implementation of the minority ownership policies. *See, e.g., Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm.*

on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989 to examine further the issue of minority ownership of broadcast stations. *See Hearings on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

Thus, it is clear that the FCC's comparative hearing minority enhancement credit policy was established and has been applied under the direction of the Congress to foster what Congress has determined is a compelling federal interest.

B. The FCC Developed an Extensive Record Demonstrating the Compelling Interest in Promoting Diversity of Ownership Through Use of the Minority Enhancement Credit Policy

As noted above, the FCC historically has recognized that diversity of control of the media of mass communications constitutes a primary objective of its broadcast licensing scheme. *See Comparative Hearing Policy Statement, supra.*

Despite the national importance of diversity of ownership of mass media, until adoption of the FCC's 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (hereinafter *Minority*

Ownership Policy Statement), minorities, particularly African Americans, had little access to broadcast properties as owners. When Congress passed the Radio Act of 1927, African Americans, due to the vestiges of slavery and *de jure* and *de facto* segregation, had no opportunity to own radio stations. No American broadcast station was owned by an African American until Jesse B. Blayton purchased an existing station, WERD(AM), in 1949.[2] It was not until 1956 that a company owned by African Americans was granted a construction permit to build a new broadcast station.[3]

In 1968, the FCC first articulated the need to assure that broadcast licensees did not discriminate against racial minorities in their employment practices. *See Petition for Rulemaking to Request Licensees to Show Discrimination in their Employment Practices*, 13 F.C.C.2d 766 (1968). In 1968 the Commission stated:

> we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy.

Id. at 767.

A year later, the Commission adopted rules which prohibited discrimination by broadcast licensees in employment on the basis of "race, color, religion or national origin" and also required that "equal employment opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969). In 1970, the Commission adopted rules requiring most broadcast licensees to file annual employment

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[2] M. Muhammed, *Minority Participation in Broadcasting*, Dollars & Sense, May/June 1979, at 18.

[3] *Id.*

reports and to file a written equal employment opportunity program when filing certain application forms. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970). In 1975, the Commission reiterated and clarified its policy on employment discrimination. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975). In 1976, the Commission adopted a Model Equal Employment Opportunity Program to be followed by all broadcast licensees. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

The Commission explained in its *Minority Ownership Policy Statement* that it had taken other actions to assure that the needs, interests and problems of a licensee's community, including the minorities within that community, were both ascertained and treated in the programming of the licensee. Under the Commission's ascertainment guidelines, broadcast licensees were required to contact minorities, as well as nineteen other specified groups in the communities they served, to determine community interests so that the licensee could present programming responsive to those interests. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976).

After recounting this long list of very careful and considered measures to increase minority input into broadcast programming the Commission then pointed out the inadequacy of these measures:

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to

> the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Minority Ownership Policy Statement at 981.

In making this determination, the Commission explained that it was basing its conclusion on specific findings it had made in its *Report on Minority Ownership in Broadcasting* (May 17, 1978) (hereinafter *Minority Ownership Task Force Report*). The *Minority Ownership Task Force Report* developed much of its information from testimony given by witnesses at a two-day minority ownership conference held April 25-26, 1977 at the Commission. In its *Minority Ownership Task Force Report* the Commission recognized the acute underrepresentation of minorities among broadcast station owners (at that time it was less than one percent, while today it is still less than two percent). The conference was held to provide the participants with an opportunity to identify obstacles confronting minorities seeking to obtain broadcast licenses and to define possible means of overcoming the obstacles to ownership. *Minority Ownership Task Force Report* at 1.

Analyzing the findings of its *Minority Ownership Task Force Report*, the Commission stated in its *Minority Ownership Policy Statement* that:

> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably

> enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because 'diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.'
>
> What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

Minority Ownership Policy Statement at 982 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)).

The Commission then concluded:

> We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

Minority Ownership Policy Statement at 982 (citations omitted).

The above detailed description of the steps taken by the FCC to encourage minority involvement in programming decisions demonstrates clearly that the FCC developed a full record upon which it based its determination that there was a compelling interest in promoting diversity of ownership by minorities through use of the comparative hearing minority enhancement credit policy.

IV. THE COMPARATIVE HEARING MINORITY ENHANCEMENT CREDIT POLICY IS NARROWLY TAILORED TO ACHIEVE DIVERSITY OF CONTROL OF BROADCAST STATIONS THROUGH ENCOURAGEMENT OF MINORITY OWNERSHIP

The preceding description of the record developed by the FCC and repeatedly approved by Congress demonstrates not only the compelling interest being addressed by this policy, but also demonstrates that the comparative hearing minority enhancement credit policy is narrowly tailored to serve that compelling interest. The FCC's race-neutral efforts, beginning in 1968, to encourage employment of minorities by broadcast licensees, and to require ascertainment of minority programming interests by all licensees, demonstrates that the comparative hearing minority enhancement credit policy was adopted only after these other race-neutral extensive efforts failed to produce any significant results in diversifying the control of broadcast programming decisions.

Moreover, the policy is narrowly tailored in the following additional aspects: (1) it does not establish a quota or even a set-aside. If nonminorities having superior comparative qualifications apply for all FCC licenses, it is possible that minorities would win no comparative hearings. (2) Nonminorities are not barred from competing for any frequency. Every frequency the FCC makes available for applications can be applied for by anyone. (3) The minority enhancement credit is but one secondary factor among many factors (several of which are of greater importance) considered by the FCC.

Thus, the comparative hearing minority enhancement credit policy is directly analogous to the permissible minority preference policy used by Harvard College and approved by Justice Powell in *Bakke*, 438 U.S. 265. Justice Powell placed great emphasis on the fact that the admission plan described there did not establish quotas or set-asides, did not prevent any nonminority from applying for

any seat in the class and was only one factor among many considered in the admissions process. *Id.*

Moreover, the policy is consistent with this Court's *Fullilove* and *Wygant* decisions. The policy is consistent with the *Fullilove* set-aside plan in that it has only a small impact on nonminorities. *See Fullilove*, 448 U.S. at 484-85 n.72 (Burger, C.J.). In *Fullilove*, Chief Justice Burger noted that it was "not a constitutional defect in [the minority business enterprise set-aside provision] that it may disappoint the expectations of nonminority firms." *Id.* at 484. He added that this was especially true given that the 10% minimum minority participation requirement translated into only 0.25% of the annual expenditure for construction work in the United States. *Id.* at 484-85 n.72. Here, no set aside even exists.

Similarly, the degree of impact on specific applicants, such as Metro, does not cause the policy to fail under constitutional scrutiny. In *Wygant*, the Court struck down a preferential layoff plan, but distinguished between preferential layoff plans and hiring plans. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83 (1986) (Powell, J.). In his *Wygant* opinion, Justice Powell observed that, "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.*

Finally, it is clear that Metro failed to receive maximum credit for many of the FCC's other comparative criteria. Therefore, had Metro been a more desirable applicant in some of the other more important criteria where it was deficient, the minority ownership of Rainbow would not have been decisionally significant and Metro would have been awarded the construction permit. The deficiency lies not with the FCC's policy but with the quality of Metro's application.

V. THERE ARE IMPORTANT PUBLIC INTEREST BENEFITS WHICH WILL RESULT FROM A DETERMINATION THAT THE DISTRESS SALE POLICY IS CONSTITUTIONAL

In order to place this case in proper perspective, it is necessary for the Court to answer two questions: What overall public interest benefit does our nation obtain by a determination that the comparative hearing enhancement credit policy is constitutional? What overall public interest harm might our nation incur from a determination that the comparative hearing enhancement credit sale policy is constitutional?

On the benefit side, we must begin with a clarification. In his dissent below, Judge Williams goes on at great length to argue that the majority's decision was premised on the notion that the societal benefit which is to be achieved by the FCC's minority enhancement credit policy is "minority programming." *Winter Park*, 873 F.2d at 351-56. This characterization is misleading, patronizing and stereotypes minority broadcasters. Although many minority station owners have used the airwaves to help eliminate the dearth of minority oriented programming,[4] to suggest that their contributions have been limited to minority programming is to do an injustice to the efforts of these broadcasters. Minority owners contribute to the overall commerce of their respective communities in three crucial areas: increased employment opportunities for minorities in management as well as staff positions; increased business opportunities for ancillary minority businesses as well

[4] The Congressional Research Service has determined that minority station owners, particularly African American owners, tend to do minority oriented programming and that there is a nexus between minority ownership and minority oriented programming. Congressional Research Service, Library of Congress, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?*, June 29, 1988 at CSR-13, CSR-27.

as minority vendors and suppliers; and increased training opportunities for minority students.

Minority station owners also bring to the airwaves diversity of control over programming decisions. It is narrow-minded to presume that all programming which appeals to minorities is "minority programming." Similarly, programming which might be described as "minority programming" often appeals to non-minorities. (The long-running number one television program, "The Cosby Show," graphically illustrates this phenomenon.)

The minority owner brings to the airwaves a minority perspective on programming, which has been lacking in an industry dominated by white males. This input is most influential in the news area. While a responsible broadcaster does not consciously slant news stories to appeal to any particular racial audience, all broadcasters must decide daily what is "news." Whether to carry a story about a local councilman's speech on drug abuse instead of a report on political developments in Eastern Europe, whether to do a thirty second story or a two minute story on an abortion march, whether to report an incomplete story on possible political corruption or to hold it until additional research can be done? These are the types of decisions made several times each day by broadcasters. They are subjective decisions and the personal background of the person making these decisions necessarily will influence the decisions he or she makes. The results of these news decisions will often go a long way toward shaping public awareness and ultimately public opinion about the issues and people in the news.

In a nation built upon the premise of "free speech" and the sanctity of allowing—indeed encouraging—differing views to be heard, it is a failure of national broadcast policy that diverse opinions rarely can be found on the nation's airwaves. Through its minority ownership policies, which are designed to provide and to preserve diversity,

the FCC represents the only government outpost still true to the tenets of the First Amendment and of Congress's intent when it formulated the Communications Act of 1934. While the societal benefits of a free press are not being challenged directly in this proceeding, the FCC's recognition that a free press must include outlets of expression for all members of a pluralistic society is being challenged. The FCC has recognized that certain segments of our society historically have been denied access to the exercise of their free speech rights and that such denial harms all of society because the entire society has been denied its rights to experience and consider differing opinions.

The FCC, through its comparative hearing minority enhancement credit policy, attempted to facilitate the emergence of minority voices in the exercise of their First Amendment freedoms through participation of minorities in the ownership of stations and in the control of programming decisions. In order to accomplish this, the FCC embraced a very basic principle of business and democracy: ownership is control.

Those concerned about the possibility of public interest harm resulting from upholding the comparative hearing minority enhancement credit policy often raise two issues: (1) Does this policy create reverse discrimination against nonminorities? (2) Does this policy stigmatize minorities? In *Croson*, Justice O'Connor, was clearly concerned about both of these issues. Considering first the issue of reverse discrimination, any policy which allocates a finite resource between competing interests will always leave one of those interests without that resource. Every time Congress decides to make the age old choice between "guns or butter," it deprives some interest group of a resource. However, allocation of resources is not discrimination, it is the making of a choice. As is clear from the discussions elsewhere in this brief, Congress has a compelling interest in making the choice to allocate limited broadcast resources so as to encourage minority ownership. More importantly, the

choice at issue in this proceeding is one which Congress would not have been required to make were there not a history of racial discrimination in American society.

However, the above answer does not address a side issue to the reverse discrimination issue. That issue is: Does this policy create a public perception of reverse discrimination? In other words, does this policy inflame racial tensions by making nonminorities feel that minorities are being treated better than nonminorities? The answer to this question is very subjective. In all candor, the answer may be that some nonminorities do feel this way. However, the possibility of those feelings cannot deny the fact of or erase the impact of a history of slavery and subsequent society-wide discrimination endured by African Americans. The court cannot ignore the evil of a history of racism which has created the need for the policy we must defend herein.

In the face of such a well-documented and historical pattern of racial discrimination such as exists in the United States, it is a cruel twist of the intent of the Fifth, Thirteenth and Fourteenth Amendments even to suggest that a policy as benign as the comparative hearing minority enhancement credit policy could result in reverse discrimination. Slavery did exist. "Jim Crow" laws did exist. "Separate but equal" did exist, until this Court finally overturned that injustice. We cannot sweep away, under some vague notion of "possible" reverse discrimination, the vestiges of those documented patterns of racism, perhaps in the faint hope that memories of this sad past will simply fade away. The comparative hearing minority enhancement credit policy is an effort to face the realities of our racial history head-on, and attempt some limited relief. The Court cannot allow potential hostility to its decision to cloud the obvious public interest benefits to be achieved from upholding the constitutionality of the comparative hearing minority enhancement credit policy.

Finally, we note that the Court may be concerned about the societal impact of stigmatizing minorities. As the trade association of African American owners of broadcast facilities, NABOB is uniquely qualified to address the issue of stigmatizing minorities in the context of the comparative hearing minority enhancement credit policy, because some NABOB members have acquired broadcast stations through use of the comparative hearing minority enhancement credit policy.

In addressing the issue of stigmas, this Court should begin by recognizing that stigmas are not new to African Americans, or to most racial minorities in America. Every day African Americans see and hear in the broadcast media images and commentaries which negatively stigmatize all African Americans. We bear a stigma which in Boston allowed Charles Stuart, an apparent murderer, to use racism to cloak his crime. The majority controlled media were used by Stuart to create a climate of hysteria and racial tension which lasted for weeks.[5] Perhaps, if there had been even one African American controlled television station in that city, objectivity, and maybe the truth, might have found the light of day much sooner.

The Stuart case is an extreme example of the daily situation in which African Americans bear the stigma of the Willie Horton's of the world, the rapists, the crack dealers, the crack users, the robbers, and the murderers. The many positive accomplishments of African American businessmen and businesswomen, politicians, doctors, educators and other professionals are rarely "news worthy" in the eyes of those who control the major communications facilities in this country.

It may be that there are those who would stigmatize those minorities benefiting from the FCC's comparative

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[5] Edley, *Why Everyone Believed Charles Stuart*, Legal Times, January 22, 1990 at 24.

hearing minority enhancement credit policy. However, as owners of broadcast stations, we know that the broadcast industry evolved in the early 20th century at a time when African Americans lived under *de jure* segregation in the south and *de facto* segregation in the north. Therefore, we African Americans had no equal opportunity to become the leaders of that industry, which was mature before its doors were ever open to us. By the time the doors were opened, not only racial discrimination but its tandem economic stratification prevented our advancement. Therefore, any potential stigma which may attach to acquiring a station through the comparative hearing minority enhancement credit policy pales to nothingness when compared to the stigma of having to watch our community portrayed, spoken for, spoken to and analyzed by voices which are not our own. The Court need not look to protect us from the stigma of receiving preferential treatment. Rather, we request that the Court protect our children from growing up in a society where the broadcast industry does not reflect meaningful ownership and programming control by African Americans.

CONCLUSION

For the reasons set forth above, the National Association of Black Owned Broadcasters, Inc. and Congressman Edolphus Towns request that the Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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No. 89-453

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Communications Commission's policy of awarding qualitative enhancements for female ownership in comparative licensing proceedings violates equal protection guaranteed under the Fifth Amendment of the United States Constitution.

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BRIEF AMICUS CURIAE OF AMERICAN WOMEN IN RADIO AND TELEVISION, INC. IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

American Women In Radio and Television, Inc. ("AWRT") submits this brief *amicus curiae* in support of respondents, Federal Communications Commission, *et al.* All parties to this suit have given written consent to the filing of this *amicus* brief. Copies of such consents have been filed with the Clerk of this Court.

The question before this Court encompasses the validity of both the qualitative enhancement merit given by the Federal Communications Commission ("FCC") for minority ownership and the qualitative enhancement merit for female ownership in comparative licensing proceedings. Although the Court of Appeals for the District of Columbia Circuit held that the female enhancement merit was not determinative in this case and, thus, did not reach the issue of the constitutionality of such an enhancement, AWRT addresses its constitutionality herein.

INTEREST OF THE AMICUS CURIAE

American Women In Radio and Television, Inc., founded in 1951, is a national non-profit membership organization of professionals in the electronic media and allied fields. The members include women who hold ownership and management positions at broadcast stations, as well as women who are potential broadcast station owners.

The goals of AWRT include working to promote the entry, development, and advancement of women in the electronic media and allied fields as well as the expansion of programming and editorial views which reflect the diversity and sometimes unique perspective held or articulated by women. In furtherance of these objectives, AWRT has been a frequent participant in proceedings before the FCC and the courts, particularly those pertaining to equal employment opportunities and comparative licensing matters.

STATEMENT OF THE CASE

Amicus adopts the identification of constitutional provisions involved and the Statement of the Case as

set forth in the Brief of Federal Communications Commission.

SUMMARY OF ARGUMENT

The constitutionality of the female enhancement merit should not be addressed by this Court since it was neither determinative nor even dealt with below. If it is, however, the merit is valid if it serves an "important governmental objective" and is "substantially related to the achievement of those objectives." Given the Constitutional imperative of maximizing the exposure of voices and views in the marketplace of ideas, and that imperative's conflict with the inherent limitation of the broadcast spectrum, it can hardly be contended that the resolution of that conflict is not at least an "important governmental objective."

The use of a female enhancement merit in comparative applications before the FCC does not raise the normal gender-based concerns of applying fixed notions concerning the roles and abilities of males and females. Nor does it exclude or protect members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior. Rather, it recognizes the value of assuring that, in at least some cases, women's viewpoints are expressed to society at large.

First, it requires neither intensive fact gathering nor doctoral degrees to appreciate that, on at least some subjects, many women's views and perspectives on issues may be different from those of men. This determination does not rely on judgments of inferiority or superiority; it does not demand adherence to archaic beliefs or stereotyped views of either women or men; it does not call into play "protection," "hand-

icaps," or biases. It merely recognizes that there is likely to be a diversity of expression.

Second, there can be little doubt that the expression of women's views is more likely to occur where women are the owners and operators of broadcast stations as they are when the FCC awards enhancement merit. These owners are not mere figureheads—they can and will affect the presentation of views and programs broadcast.

Thus, where promotion of diversity of views is the governmental objective, there can be little doubt that the means selected, enhancing women's ownership and operational participation in broadcasting, is substantially related to the achievement of that objective. Indeed, it may well be the only means to reach that objective short of direct and unconstitutional governmental intervention into the content of broadcasts.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE FCC'S FEMALE ENHANCEMENT SHOULD NOT BE ADDRESSED.

As noted by the District of Columbia Court of Appeals in its opinion in this case, *Winter Park Commun., Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), the FCC determined that the outcome of this comparative licensing proceeding would not change even if no consideration were given to Respondent's five percent female participation. *Id.* at 352 n.5 (citing 3 F.C.C. Rcd. at 867 n.1). For that reason the Court of Appeals did not rule on the constitutionality of the FCC's female enhancement merit. *Id.* at 352-353 n.5.

Under circumstances where the issue raised would not affect the outcome of the case and where this

Court does not have any ruling of the lower court to review, this Court should decline to address or deliver an advisory opinion on the issue. If this Court chooses not to deal with this issue, the remainder of this brief need not be considered. However, in the event the Court determines to rule on the validity of the FCC's female enhancement, AWRT will now discuss the merits of this issue.

II. AWARDING ENHANCEMENT MERIT TO APPLICANTS PROPOSING OWNERSHIP BY FEMALES WHO WILL OCCUPY MANAGEMENT POSITIONS IS CONSTITUTIONAL.

A. The Female Enhancement Merit Complies With Due Process If It Serves An Important Governmental Objective And Is Substantially Related To The Achievement Of That Objective.

The issue addressed herein is whether the FCC's female enhancement merit policy violates the Fifth Amendment of the United States Constitution which provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law; . . ." U.S. Const. Amend. V. This Due Process Clause requires that the federal government guarantee its citizens equal protection of the laws. *E.g.*, *Rostker v. Goldberg*, 453 U.S. 57 (1981).

Equal protection challenges to statutory or administrative classifications have been evaluated by this Court using varying tests. However, where a classification is based on gender, this Court has held that the classification must serve "important governmental objectives and must be substantially related to achievement of those objectives." *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976); *Heckler v. Mathews*, 465 U.S. 728, 744 (1984). Furthermore,

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. . . ."

Id. (quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (ellipses in original)). Analyzed against this standard, the female enhancement merit is constitutional.

B. Advancement Of A Diversity Of Viewpoints In The Limited Broadcast Spectrum Is Consistent With The First Amendment And Is An "Important Governmental Objective."

Congress, in enacting the Communications Act, delegated broad authority to the FCC to allocate broadcast licenses in the "public interest, convenience and necessity." 47 U.S.C. § 309(a). The Act does not define "public interest, convenience and necessity," but the Supreme Court has held that the term "public interest" includes many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Because the radio spectrum is limited, the FCC must devise methods for choosing among the many who apply for licenses. *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (hereafter

"NBC"). Licensee selection must advance the First Amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Thus, the FCC must select among potential licensees in a manner designed to encourage the expression of diverse viewpoints. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 860 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

In setting its licensing policies in accordance with the public interest standard mandated by Congress and the courts, the FCC has long and properly acted on the theory that the structural device of obtaining diversification of the ownership and control of mass media serves the public interest by promoting diversity of program and service viewpoints. Furthermore, because the First Amendment precludes content regulation by the federal government, structural regulation of the industry is the only means available to promote the FCC's compelling goal of advancing the public's First Amendment right to diverse information sources. Thus, in 1943, in *NBC*, the Supreme Court upheld the FCC's authority to adopt "chain broadcasting" rules to restrict the potential reach of a broadcast network. *NBC*, 319 U.S. at 226-227. In the four decades since that decision, both the courts and the Congress have consistently approved the FCC's reliance, in a variety of contexts, on structural regulation to promote the goal of maximizing the diversity of viewpoints available to the public.

The Supreme Court has also recognized the compelling justification behind the pursuit of diversity of ownership and control. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this

Court approved limitations on cross ownership of media and held that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 796. Likewise, the Court of Appeals for the District of Columbia Circuit has recognized the relationship between diversity of ownership and control and the First Amendment goal of diversity of viewpoints and ideas. Thus, in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), it confirmed the FCC's responsibility to

> seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint. . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies.

Id. at 1213 n. 36 (citation omitted) (rejecting the FCC's effort to eliminate the diversification of ownership criterion from the factors considered in comparative hearings). *See also*, *Greater Boston*, 444 F.2d at 860; *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) ("TV 9").

In short, there is a long and widely recognized statutory and indeed Constitutional imperative to provide a diversity of views in this country. It is difficult to imagine that a mandate as deeply ingrained as this one could be downgraded to anything less than an "important governmental objective." Furthermore, it

is patent that expanded diversity ultimately reaches an impasse when it comes into conflict with the reality of the inherent limitations of the electronic spectrum available for broadcast communication. Again, it cannot reasonably be contended that the ability of the gatekeeper, the FCC, to resolve this conflict between increasing diversity of viewpoints and limited availability of spectrum within which to express them, is not an "important governmental objective."[1]

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[1] Although the diversity rationale is more than sufficient to sustain the constitutionality of the enhancement factor, Congress, the courts and the FCC have repeatedly noted the historical discrimination against women. *See, e.g.*, S. Rep. No. 689, 92d Cong., 2d Sess. 6-9 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Equal Employment Program*, 32 F.C.C.2d 708, 709 (1971). Congressional hearings considering the status of women in business were held in 1976, 1977, 1978, 1980 and 1984. *Women and Business Ownership*, U.S. Dept. of Commerce, at 129-133 (1986). Furthermore, a study commissioned by the FCC, *Female Ownership of Broadcast Stations*, the ELRA Group, Inc. (1982), found that while women represent more than half of the population of this country, they own only 2.8% of its television stations, 8.6% of its AM stations, and 9% of its FM stations. *Id.* at ii. *See also* Congressional Research Service, *Minority Broadcast Station Ownership Broadcast Programming: Is There A Nexus?* (June 29, 1988); H.R. Conf. Rep. No. 765, 95th Cong., 2d Sess. 40, reprinted in 1982 U.S. Code Cong. & Ad. News 2261.

At a time when, fostered by such factors as women's improved access to credit, the women-owned segment of the nation's business is growing twice as fast as the segment owned by men (U.S. Small Business Administration, "Facts About Women Small Business Owners"), and when many new broadcast stations have become available, it is appropriate to encourage the interest of women entrepreneurs in the broadcasting industry. This, in turn, will promote the public interest in having

C. The Female Enhancement Merit Is A Means Substantially Related To The Achievement Of The Objective.

The FCC's means to provide more diversity of viewpoints is the female enhancement merit awarded to applicants who place women owners in management positions. First, by affording a structural solution to increase diversity, this approach adopts both a widely utilized method and one which avoids entanglements with content regulation prohibited by the First Amendment. Second, by using the merit as merely one of a number of factors to evaluate the ultimate comparative award, the FCC minimizes any discrim-

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access to diverse viewpoints.

In recognition of the need to assist women in overcoming the effects of discrimination and other obstacles to their economic equality, and of the national policy of developing the women-owned sector of the nation's business, in 1979, President Carter issued Executive Order No. 12138, citing Congressional findings recognizing the "many obstacles facing women entrepreneurs." Exec. Order No. 12138, 44 Fed. Reg. 29637 (1979). Among the requirements of this Order is that federal agencies "establish incentives to private business or business-related opportunities for women's business enterprise," an objective advanced by the positive impact of the recognition of female "merit" on the number of women-owned broadcast applicants. Similarly, in 1983 President Reagan issued Executive Order No. 12426, establishing the President's Advisory Committee on Women's Business Ownership. Exec. Order No. 12426, 48 Fed. Reg. 24463 (1983). Thus, there is ample evidence of the impact of historic discrimination against women on their role in business, and of the national policy designed to address this problem in order to realize the full potential of this segment of commerce. *See also Women and Business Ownership*, at 18-19, 21, 27, 32, 117-122 (discussing the existence and impact of discrimination against women in access to credit and of historical prejudice and social economic barriers faced by women).

inatory impact or effect. Third, the policy is efficacious in achieving the desired objective.

1. Structural Solutions Used By The FCC Are Familiar And Constitutionally Acceptable.

In its *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978), the FCC recognized that the First Amendment precludes it from directly mandating the programming decisions of broadcast licensees and declared that "affecting programming by means of increased minority ownership . . . avoids direct government intrusion into programming decisions." *Id.* at 981. The FCC thus concluded that it must employ structural means to attain its paramount policy objective of diversity of viewpoints and program sources in order to promote the First Amendment rights of the public without offending the First Amendment rights of broadcaster.

In *West Michigan Broadcasting Corp. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), the Court of Appeals for the District of Columbia Circuit expressly approved the grant of enhancement credit for minority ownership and control because it would promote diversity of information sources for the public. *Id.* at 614.[2]

Not only have the FCC and the courts approved the use of female enhancement merit in FCC com-

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[2] *And see WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395-96 (1965); *TV 9*, 495 F.2d at 941 & n.2; and *cf.*, *National Organization for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977) (FCC's equal employment regulations are "less intrusive on the First Amendment, for assuring that licensees provide fair and balanced coverage of news on women's issues").

parative licensing proceedings, Congress has approved and, in essence, mandated its use. Thus, in the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes*, Public Law No. 100-202, 101 Stat. 1329-31 (1987), Congress specifically withdrew funding from any FCC effort to reexamine its female enhancement policy. Similar legislation was enacted in 1988 and 1989. *See Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-457, 102 Stat. 2216-17 (1988); *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990*, Public Law 101-162, 103 Stat. 988 (1989).

Congress also endorsed the FCC's reliance on structural means of achieving diversity in its 1982 amendments to the Communications Act. Congress found that "the American public will benefit by having access to a wider diversity of information sources." H.R. Conf. Rep. No. 765, 95th Cong., 2d Sess. 40, 44-45 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2261, 2287. In enacting legislation authorizing lottery selection among competing license applicants (47 U.S.C. § 309(i)), the Congressional conferees expected "that this approach to enhancing diversity through such structural means [promoting ownership by underrepresented groups] will in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 44-45.

2. The FCC Examines A Variety Of Factors In Comparative License Proceedings.

In order to further understand the FCC's use of structural approaches to carry out its necessary role in comparative hearings and to appreciate the wide

variety of evaluative factors the FCC utilizes, it is useful to review briefly the overall comparative licensing scheme.

In selecting among mutually exclusive applications in a broadcast licensing proceeding, the FCC seeks to determine which of the various applicants will best serve the public interest.[3] In 1965, the FCC adopted a *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereafter, "*1965 Policy Statement*"), in which it set forth the criteria which, with some modifications, are still used in conducting comparative evaluations. As explained in the *1965 Policy Statement*, the two primary objectives toward which the comparative process is directed are: (a) the maximum diffusion of control of the media of mass communications, generally known as "diversification of control," and (b) the best practicable service to the public.

In weighing these two factors, the FCC has consistently held that diversification is the factor of primary significance. *Snake River Valley Television, Inc.*, 26 F.C.C.2d 380 (Rev. Bd. 1970); *Ramon Rodriquez et al.*, 4 F.C.C. Rcd 6817 (Rev. Bd. 1989). Under the diversification factor, the FCC considers both common control and less than controlling interests in other broadcast stations and media of mass communications. Media interests of an applicant's principals in the principal community to be served will normally be of most significance followed by other interests in the remainder of the service area. *1965 Policy State-*

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[3] The FCC also examines the citizenship, character, financial, technical and other qualifications of applicants to operate a broadcast station. *See* 47 U.S.C. § 308.

ment, 1 F.C.C.2d at 394. Depending on the nature and extent of such interests, the applicants may receive "slight," "moderate," or "substantial" demerits. An applicant with no or less extensive demerits receives an overall "preference" under the diversification factor. *See, e.g., Richard P. Bott, III*, 4 F.C.C. Rcd 4924 (Rev. Bd. 1989).

The second primary factor is best practicable service to the public. One of the chief indicators used to evaluate this factor is integration of ownership and management. Under the "integration" concept, the FCC measures the extent to which owners will actively participate in, or be integrated into, the day-to-day management of the proposed station. The FCC computes an applicant's *quantitative* participation percentage by examining only the involvement of the voting shareholders (or general partners in a limited partnership) on the basis that non-voting principals have no managerial control over the operational activities of the corporation. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd 5017, 5018-19 (Rev. Bd. 1988). The highest preference is awarded for full time "integration of stockholders [or general partners] exercising policy functions," *1965 Policy Statement*, 1 F.C.C.2d at 395, but part-time integration credit can also be awarded. *Omaha TV 15, Inc.*, 4 F.C.C. Rcd 730 (1988). In addition, the FCC looks at the type of position the integrated shareholder or general partner will hold[4] and the likelihood that the proposal will be

[4] Particular weight is given to certain managerial-level positions such as General Manager, Station Manager, Program Director, Director of News or Public Service Programming and Sales Manager. *See 1965 Policy Statement*, 1 F.C.C.2d at 395.

effectuated. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd at 5019-20.

An "integration" proposal is also evaluated from a *qualitative* standpoint. Qualitative attributes that the FCC considers as enhancing an applicant's qualitative proposal include local residence, civic participation, broadcast experience and minority and female ownership. *1965 Policy Statement*, 1 F.C.C.2d at 395; *TV 9*, 495 F.2d at 941 nn. 1-2; *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 n.13 (1982). However, the qualitative factors cannot overcome a "clear" quantitative difference. *Stanly Group Broadcasting, Inc.*, 3 F.C.C. Rcd at 5019. *Van Buren Community Service Broadcasters, Inc.*, 87 F.C.C.2d 1018, 1022 (Rev. Bd. 1981). Broadcast experience has less significance as a qualitative enhancing factor than local residence because "experience generally confers only an initial advantage." *1965 Policy Statement*, 1 F.C.C.2d at 396. Local residence and civic activities are separate enhancement features. *See, e.g., Radio Jonesboro, Inc.*, 96 F.C.C.2d 1106, 1109 (Rev. Bd. 1984), *aff'd* 100 F.C.C.2d 941, 947 (1985); *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260 (1982), *aff'd sub. nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Minority and female ownership are considered "plus factors" to be weighed along with all other relevant factors in determining which applicant is to be awarded an integration preference. *TV 9*, 495 F.2d at 941 and n.2. Female ownership has less significance than either minority ownership or local residence. *Miracle Strip Communications, Inc.*, 4 F.C.C. Rcd 5064 (1989).

In addition to the diversification factor and integration factor, the comparative evaluation can also

include issues on proposed program service, past broadcast record, efficient use of frequency, auxiliary power and comparative coverage of each applicant's technical facility. *See generally 1965 Policy Statement*, 1 F.C.C.2d 393; *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 F.C.C.2d 667 (196); *Vela Broadcasting Co.*, 2 F.C.C. Rcd 3663 (Rev. B 1987).

The FCC's comp ative evaluation varies from case to case depending upon the composition of the applicants and the weight received for each of the factors described above. Even where an applicant has substantial female ownership, it is by no means certain that the applicant will prevail. *See, e.g., Miracle Strip Communications, Inc.*, 4 F.C.C. Rcd at 5068.[5]

Thus, it is clear that the FCC's use of structural means to enhance diversity is a generally applied tool; not one simply aimed at creating favorable results for "disadvantaged" classes. Moreover, the female enhancement merit is clearly not determinative, but is one of a panoply of factors to be evaluated.

[5] In at least one respect, petitioner has seriously mischaracterized the nature of the FCC comparative hearing process. Petitioner raises the spectre of sham applications. However, such applications are usually exposed in the discovery process and, in any event, the FCC has recently taken steps to eliminate the possibility of shams. *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 F.C.C. Rcd 3853 (1989). According to petitioner, "[o]nce an award is made there is no assurance that the minority or female chosen will retain the permit, rather than sell to a non-minority group member, or a male." (Pet. Brief at p. 44). However, the FCC's rules prohibit an applicant who obtains a construction permit as the result of a comparative hearing from transferring the permit until one year after the applicant has commenced program tests on its facility. *See* 47 C.F.R. § 73.3597(a)(1).

Nor is the FCC's use of structural means to obtain the objective of diversity of women's views unique to the comparative hearing process. Thus, for example, in recognition of the significant underrepresentation of women in broadcasting and to address the specific issue of employment discrimination against women, the FCC in 1971 included women in its equal employment opportunity requirements. *Equal Employment Program*, 32 F.C.C.2d 708, 709 (1971). This Court, in *NAACP v. FPC*, 425 U.S. 662 (1976), noted that the FCC's equal employment opportunity requirements, which rely on the structural approach of reviewing employment statistics resulting from licensee implementation of equal employment policies rather than reviewing specific employment decisions, "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoint of minority groups." *Id.* at 670 n.7. In the employment context, therefore, this Court thus recognized the nexus between participation of all segments of the population in broadcasting and achievement of the goal of providing diverse viewpoints, as well as the FCC's responsibilities for fostering that goal.

3. The Female Enhancement Merit Substantially Relates To Achieving A Diversity Of Viewpoints

An analysis of recent Supreme Court cases suggests that the substantial relationship prong of the equal protection test implicates at least two facets of potential discriminatory classification. First, do preconceived and stereotypical views of classes underpin or

provide the justification for the means of dealing with the objective? If so, the means itself will be equally infected and unacceptable. Second, will the selected means be likely to accomplish the objective? If not, one must question the non-discriminatory impact and intent of the proposed solution. In this case, the female enhancement merit passes scrutiny.

Neither the objective of increasing the diversity of voices and viewpoints in the marketplace of ideas, nor the award of enhancement merit for applicants who use women in managerial positions as one factor in evaluating comparative applications, raises the normal gender-based concerns which have troubled this Court. *See Heckler*, 465 U.S. at 745. Neither the objective nor the award involves application of " 'old notions' and 'archaic and overbroad' generalizations about the roles and abilities of men and women." *Id.* (citations omitted). They do not "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior . . . ." *Id.* Rather, they recognize the value of assuring that, in at least some cases, women's viewpoints are expressed to society at large and made available to the marketplace of ideas.

First, it requires neither intensive Congressional fact-gathering nor doctorates in biology, genetics or psychology to appreciate that, on at least some subjects, many women's views and perspectives on issues may be *different* from those of men. This determination does not rely on judgments of the inferiority or superiority of those differing viewpoints; it does not demand adherence to archaic beliefs or stereotyped views of either women or men; it does not call into play "protection" or "handicaps" or prejudices

or biases. This does not require determining whether there is "women's programming," or a "women's-targeted audience," which bothered Judge Williams in his dissent in the court of appeals below. *Winter Park*, 873 F.2d at 358 (Williams, J. dissenting). It merely recognizes that there is likely to be diversity of expression.

Second, there can be little doubt that the expression of women's views is more likely to occur where, as here and in all cases in which the FCC awards enhancement merit, women are the owners and operators of broadcasting stations. These owners are not mere figureheads. They can and will affect the presentation of views and programs broadcast. FCC rules require licensees who are owners and operators to assume responsibility and be accountable for program content. 47 C.F.R. § 73.658(e); *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (*en banc*); *Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976). One can hardly take seriously petitioner's suggestion that the use of limited partnerships funded, controlled and "comprised of 100 white males with one . . . female 'general partner'" will negate all female input into program content. (Pet. Br. at 44.)[6] This Court need not propound

[6] It is, of course, precisely *this* type of stereotyping—the poor women, helpless pawns to the powerful, law-subverting males—that this Court has been attempting to end. Furthermore, it is surprising in the extreme to have petitioner suggest that it is really that easy for white males to avoid the impact of the FCC female enhancement merit through sham applications. Petitioner's equal protection claim is much different if its only complaint is that it is being denied the ability to have a white male serve as a figurehead licensee.

constitutional rulings on the assumption that all potential licensees will be scofflaws.

Thus, where promotion of *diversity* of viewpoints, not preservation of inferior views, is the governmental objective, there can be little doubt that the means selected—enhancing women's ownership and operational participation in broadcasting—is substantially related to the achievement of that objective. Indeed, it may well be the *only* means to reach that objective short of direct governmental intervention in or regulation of the content of the broadcasts which would be patently violative of the First Amendment.

The female enhancement merit from its inception has been designed specifically to further the FCC's fundamental policy of encouraging diversity of viewpoints, not to remedy societal discrimination. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). While the FCC is required only to have a reasonable expectation, not certainty, that its policy will be effective (*TV 9*, 495 F.2d at 938), there is also empirical evidence that the presence of women in broadcast ownership and management is beneficial not only to female listeners, but also to the listening public in general by broadening the diversity of viewpoints presented. *Amicus* AWRT has, since 1975, granted National Commendation Awards each year to programs which present issues of particular importance to women or which present women in a positive and realistic light. An analysis of local radio and television station entries submitted for the 1986 awards showed that programs of these types have a substantial majority of women writers, producers, and reporter/hosts. The analysis found that, with respect to radio entries, women represented 84.2% of the writers,

58.5% of the producers, and 92.9% of the reporter/hosts. In contrast, according to the FCC's 1986 Cable and Broadcast Industry Equal Employment Opportunity Trend Report, in 1985 women filled only 29.8% of the total broadcast positions in the Officials and Managers and Professionals categories. FCC, *Cable and Broadcast Industry Equal Employment Opportunity Trend Report* (1986). This evidence shows that where women hold management roles with influence over content and treatment of issues, it can be anticipated that programs will feature a larger percentage of issues of concern to women, as well as provide a different viewpoint to all listeners and viewers. It confirms the reasonableness of the FCC's position that recognition of a female enhancement merit promotes diversity of viewpoints in the public interest. *See Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Although utilizing different substantive Constitutional tests, prior opinions of Justices of this Court clearly support the validity of the FCC's female enhancement merit. The structural method of awarding qualitative enhancements is strikingly similar to the prototype "Harvard" admissions program approved by Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271 n.1, 315-319 (1978) (Powell, J.); *id.* at 326 n.1 (Brennan, J., concurring) ("*Bakke*"). Under the factor of integration of ownership, gender-specific "merit" is just one of any number of potential FCC enhancement credits, just as ethnic background was one among many independent factors considered in terms of a university admissions policy considered in *Bakke*. The female merit is a "plus," not a quota or set-aside, and does not insulate the applicant from

comparison with all other candidates for the available broadcast license.[7] Rather, the female enhancement merit is awarded in recognition that female integrated ownership is a relevant factor when one applicant is compared with another in a licensing system designed to promote an overall broadcast licensee population reflecting and offering a diversity of viewpoints. Further, just as the existence of a special admissions program expands a student applicant pool (*Bakke*, 438 U.S. at 316-317), so too does the existence of the female enhancement merit encourage a broadening and expansion of the broadcast applicant pool, which both the courts and the FCC have recognized is in the public interest. *Crosthwait v. FCC*, 584 F.2d 550 (D.C. Cir. 1978); *Azalea Corp.*, 31 F.C.C.2d 561, 563 (1971). The program thus would comply with Justice Powell's model system. *See also, West Michigan*, 735 F.2d at 613-616 (finding the minority "merit" constitutional under the reasoning of *Bakke*).

The plurality opinion in *Bakke* concludes that if certain race-specific ends, such as achieving a more normally integrated student body, are compelling or even acceptable, then race-specific means are not automatically suspect. Justice Powell recognized diversity of students as a "constitutionally permissible goal" under the First Amendment because of the presump-

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[7] Thus, the FCC system is not analogous to the 30% minority set-aside or quota system voided in *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989).

Furthermore, as a mere factor in the determination of those to whom new licenses will be issued rather than who must relinquish licenses, the FCC's award of enhancement merit does not raise the spectre of injuring innocent parties in the name of remedying past discrimination. *See Wygant*, 476 U.S. 267.

tion that such diversity would contribute to the robust exchange of ideas on the campus, an essential ingredient of higher education. *Bakke*, 438 U.S. at 311-312. To achieve this goal, Justice Powell found universities must be free to select those students who will most likely contribute to that marketplace of ideas. The analogy of promoting a diversity of viewpoints in society at large and considering special factors which are likely to contribute to that diversity is compelling.

Subsequently, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S. Ct. 1442 (1987), this Court addressed, in a Title VII "reverse" gender-discrimination affirmative action case, a program similar in its "plus factor" structure to the university admissions process in *Bakke* and the FCC comparative licensing process at issue here.

In *Johnson*, the Santa Clara Transportation Agency had voluntarily adopted an affirmative action plan for minorities and women to attain a balanced work force. The agency considered the sex of the applicant as one of many qualification factors under the plan which was intended to help promote women to positions within traditionally segregated job classifications.

This Court first found that consideration of the sex of the applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.* at 1452. Second, this Court considered whether the plan "unnecessarily trammeled" the rights of male employees or created an absolute bar to their advancement. *Id.* at 1455. Answering this question in the negative, this Court compared the affirmative action plan in *Johnson* to

the "Harvard Plan" approved by Justice Powell in *Bakke*. *Id.* The Court said "the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* (emphasis in original).

Although not decided on constitutional grounds (*id.* at 1446 n.2), Justice O'Connor, concurring in the judgment in *Johnson*, observed that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Id.* at 1461 (O'Connor, J., concurring).

Johnson demonstrates the permissibility of the enhanced factor selection approach, even in a situation where the intended objective is the increase of the diversity of employees as an end in itself. In the case at bar, however, the governmental purpose is to promote the First Amendment rights of the public at large which cannot be advanced more directly without violence to First Amendment imperatives.

CONCLUSION

For the foregoing reasons, *amicus curiae* American Women in Radio and Television urges that if this Court chooses to examine the validity of the FCC's female enhancement merit that it find that the objective of increasing the diversity of viewpoints in the broadcast marketplace is an important governmental objective and that the female enhancement merit is a constitutional means intended substantially to achieve that objective.

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IN THE
Supreme Court of the United States
October Term, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COOK INLET REGION, INC. AND GRANITE BROADCASTING CORPORATION *AS AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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No. 89-453

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF COOK INLET REGION, INC. AND GRANITE BROADCASTING CORPORATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*•

This case involves the constitutionality of one aspect of the Federal Communications Commission's minority ownership

• The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 37.3.

policies.[1] *Amici curiae*, Cook Inlet Region, Inc. ("CIRI") and Granite Broadcasting Corporation are minority-controlled broadcasters. Through the use of the FCC's tax certificate program, one of the mainstays of its minority ownership policies, CIRI and Granite have been able to enter the broadcast field as owners and controlling parties of a number of broadcast stations.

Amici submit this brief to bring to the attention of this Court the common constitutional underpinnings of the Commission's minority ownership policies and numerous other Commission policies, as well as the tax certificate policy, the only facet of the minority ownership policies not pending before this Court. Pursuant to the Court's new Rule 37(a), *amici* believe that these are relevant matters that have not already been raised with this Court.

1. Cook Inlet Region, Inc., and Cook Inlet Communications, Inc.

CIRI is one of the 13 regional corporations established by Congress under the terms of the Alaska Native Claims Settlement Act in 1971. CIRI is owned by approximately 6,500

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[1] The Commission's minority ownership policies are: the comparative enhancement credit at issue in this case, the tax certificate, and the distress sale, which is pending before this Court in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, *cert. granted*, No. 89-700 (Jan. 8, 1990). *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) [hereinafter cited as *1978 Policy Statement*].

Athabaskan, Eskimo, Aleut, and other Alaska Native shareholders, who live in 48 states.[2] CIRI is therefore a "minority-owned" or "minority-controlled" entity pursuant to policy statements of the Commission issued under the Communications Act of 1934, as amended. *See 1978 Policy Statement*, 68 F.C.C.2d at 983 & n.20; *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, Policy Statement and Notice of Proposed Rule Making*, 92 F.C.C.2d 849 (1982)[3] [hereinafter cited as *Advancement of Minority Ownership*]; *see also* 47 C.F.R. § 73.3555(d)(3)(iii) (1988) (defining "minority-controlled").

CIRI operates two television stations and eleven radio stations[4] through limited partnerships in which its wholly-owned subsidiary, Cook Inlet Communications, Inc. ("CICI"),[5] is the controlling general partner with exclusive powers of management. The CICI board, composed of five Alaska Native CIRI shareholders, is centrally involved in the selection of

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[2] The Alaska Native population suffers from significantly greater unemployment, educational handicaps, and serious disease and injury than the general American population. Accordingly, as a matter of corporate policy, CIRI distributes approximately one-third of its net income directly to its shareholders for income maintenance. In addition, CIRI provides college scholarships and vocational training to Alaska Natives, and sponsors programs designed to enhance understanding of Alaska Native culture and history and to develop Native arts.

[3] See infra n.11 and accompanying text.

[4] CICI is the managing general partner of WTNH-TV, the ABC affiliate in New Haven, Connecticut, and WSMV-TV, the NBC affiliate in Nashville, Tennessee. CICI is also the managing general partner of eleven radio stations, including FM stations in Atlanta, Boston, Chicago, Houston, and Seattle, and AM/FM combinations in Scottsdale, Arizona; Provo, Utah; and Morningside, Maryland.

[5] CICI is 100% owned by Cook Inlet Corporation, which is 100% owned by CIRI.

management personnel and the review of the budget, programming, news, and all capital expenditures.

CICI has implemented a diversity-in-programming plan that specifically directs its station managers to develop programming sensitive to the viewpoints and contributions to society of minorities in general and Native Americans in particular. CICI also follows the philosophy of CIRI in encouraging the employment of Alaska Natives and other minorities in its stations.

2. Granite Broadcasting Corporation

Granite is a privately-owned Delaware corporation organized in 1988 by W. Don Cornwell and Stuart J. Beck for the purpose of acquiring and managing television stations. Mr. Cornwell, who is black, has been the Chairman of the Board and President of Granite since its incorporation, and holds 55% of Granite's voting stock.[4] Granite is therefore a "minority-owned" entity under the Commission's rules and policies.

Granite owns and operates two NBC-affiliated television stations, WEEK-TV, Peoria-Bloomington, Illinois, and KBJR-TV, Duluth, Minnesota - Superior, Wisconsin, and one ABC-affiliated television station, WPTA-TV, Fort Wayne, Indiana. Granite also recently acquired KNTV, an ABC affiliate serving San Jose and Santa Clara County, California.

Granite encourages the employment and advancement of minorities in its television stations, and seeks to broaden the diversity of programming offered to the communities it serves. Granite's programming philosophy, outlined in a Mission Statement issued to its stations, is premised on its recognition

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[4] Mr. Beck, the Secretary-Treasurer and a Director of Granite, holds the other 45% of Granite's voting stock.

that the local community represents a multitude of interests and viewpoints which should be reflected in and enhanced by each station's programming.

3. The FCC's Tax Certificate Policy Enabled CIRI and Granite to Become Broadcasters

Small, minority-owned companies, CIRI and Granite were able to acquire broadcast properties largely as a result of the FCC's tax certificate policy.[3] The Commission adopted its tax certificate policy in 1978 as part of its effort to increase minority ownership of broadcast facilities. *See 1978 Policy Statement*, 68 F.C.C.2d at 982-83.[5] In its *1978 Policy Statement*, the Commission noted that although it had earlier adopted other rules and policies[6] to combat discrimination and ensure that programming reflects the needs, interests, and problems of a licensee's community, the "views of racial minorities continue to be inadequately represented in the broadcast media." *Id.* at 980-81. The Commission concluded:

> [i]t is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of

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[3] The constitutionality of the tax certificate policy is not before this Court. Nonetheless, the tax certificate represents an important interest that could be affected by the Court's examination of two other facets of the Commission's minority ownership policies, the minority enhancement in this case and the distress sale in *Astroline*. Of course, whatever the resolution of the two pending cases questioning these other aspects of the minority ownership policies, a full and particularized consideration of the minority tax certificate policy is necessary before any change in that policy can be effected.

[5] The *1978 Policy Statement* also announced the Commission's minority distress sale policy. 68 F.C.C.2d at 982-83.

[6] *See infra* at 19-21.

> broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of a limited resource, the spectrum. And, of course, . . . "diversification . . . is a public good in a free society . . . ."

Id. at 981, *quoting Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965) [hereinafter cited as *Comparative Broadcast Hearings*]. Thus, the Commission at that time thought that diversity of ownership would lead to diversification of programming and viewpoints. The Commission also noted that, in accordance with controlling case law, it had already begun to give consideration to minority ownership and participation as a comparative enhancement in the award of licenses in comparative broadcast hearings. *Id.* at 981-82; *see TV 9, Inc. v. FCC*, 495 F.2d 929, 936-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *see also West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 606-16 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *Garrett v. FCC*, 513 F.2d 1056, 1063 (D.C. Cir. 1975). Nonetheless, "the continuation of an extreme disparity between the representation of minorities in our population and in the broadcasting industry requires further Commission action." *1978 Policy Statement*, 68 F.C.C.2d at 982.

The Commission therefore expanded the use of its tax certificate and distress sale programs in order to increase minority ownership, and thus diversification of ownership and programming, key objectives of the Communications Act of 1934. *1978 Policy Statement*, 68 F.C.C.2d at 981. Pursuant to

26 U.S.C. § 1071,[9] the Commission announced that it would issue tax certificates to owners who voluntarily sold their broadcast stations to minority-controlled entities.[10] *Id.*

While the tax certificate policy enabled both CIRI and Granite to become broadcasters, it did not guarantee their purchase of any broadcast property. In fact, CIRI and Granite have unsuccessfully bid for various broadcast properties which were then sold to non-minorities, without tax certificates. The tax certificate thus eases the minority-controlled entity's entry

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[9] Section 1071 authorizes the Commission to issue tax certificates whenever a sale of a broadcast property is certified by the Commission as "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations." 26 U.S.C. § 1071. The tax certificate enables sellers of broadcast properties to defer capital gains taxation on such sales. *Id.*

Section 1071 was enacted in 1943 in response to the Commission's adoption of its multiple ownership rules, which prohibit the common control of competing stations in the same market. *See Issuance of Tax Certificates*, 19 Rad. Reg. 1831, 1832 (1970); *see also* Blake and McKenna, *Section 1071: Deferral of Tax on FCC Sanctioned Dispositions of Communications Properties*, 36 TAX L. REV. 101, 108-09 (1980). Although originally used only when the Commission's multiple ownership rules required divestiture of broadcast properties (*i.e.*, through involuntary transfers), Section 1071 has long since been used to encourage licensees to transfer "grandfathered" broadcast properties. *Advancement of Minority Ownership*, 92 F.C.C.2d at 856-57 & nn.35-38.

[10] Eligible buyers would be minority-controlled entities or entities in which "minority involvement is significant enough to justify the certificate in light of the purpose of the [minority ownership] policy . . . ." *1978 Policy Statement*, 68 F.C.C.2d at 983 n.20. In 1982, the tax certificate and distress sale policies were extended to "limited partnerships where the general partner, or partners, owns [sic] more than 20 percent of the broadcasting entity and is a member, or members, of a minority group." *See Advancement of Minority Ownership*, 92 F.C.C.2d at 855; *see also Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, Memorandum Opinion and Order*, 58 Rad. Reg. 2d 604 (1985) (limited partnerships).

into the industry, but other obstacles, common to minorities and non-minorities alike, remain.

4. The FCC's Minority Ownership Policies Have Had A Beneficial Effect In Increasing Minority Ownership

The Commission's minority ownership policies have made real, but incremental, improvements in minority ownership of broadcast properties. The tax certificate policy has been the most effective of the three minority ownership programs; from 1978 to November 22, 1989, the Commission issued 201 tax certificates in conjunction with the assignment or transfer of radio and television stations. *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. 74 (1989) (statement of Roderick K. Porter, Deputy Chief, Mass Media Bureau, FCC). Notwithstanding these advances, minority ownership of broadcast stations continues to be minimal -- since 1978, the percentage of minority-owned broadcast stations has increased from less than one percent, to just over two percent, while minorities represent over 20% of the population. *Id.* at 2 (opening statement by Sen. Inouye); U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1989* 13, 16, 38 (1989). The "acute underrepresentation of minorities" among broadcasters thus continues even in the face of policies designed specifically to combat it. *See 1978 Policy Statement*, 68 F.C.C.2d at 981; *see also* Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978), *cited in 1978 Policy Statement*, 68 F.C.C.2d at 980 n.9.

As minority-controlled broadcasters whose participation in the industry was made possible by one of the FCC's minority

ownership policies[12] -- the tax certificate program -- CIRI and Granite file this brief in support of the comparative enhancement accorded to minority-controlled applicants in Commission licensing proceedings and affirmed by the court below. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), *reh'g denied*, Nos. 85-1755, 85-1756 (D.C. Cir. June 21, 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, No. 89-453 (Jan. 8, 1990). Like the tax certificate program, the minority enhancement is narrowly tailored to promote important governmental policies and is only one of several factors influencing whether a minority group member will become a Commission licensee.

SUMMARY OF ARGUMENT

The Commission's minority ownership policies clearly conform with constitutional requirements for racial classifications. The policies under review are "narrowly tailored" to achieve a "compelling government interest" and, therefore, pass constitutional muster under the "strict scrutiny" standard.

The compelling governmental interest served by the Commission's minority ownership policies is to advance diversity of ownership as a means of achieving diversity of programming service to the public. This longstanding governmental interest has been affirmed by this Court in *Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 796, 801 (1978) [hereinafter cited as *NCCB*], which recognized the First Amendment value of diversity of programming and endorsed the nexus between diversity of ownership and programming. Indeed, a significant number of Commission policies and rules, including the multiple ownership rules, are premised upon the fundamental belief that diversity

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[12] CIRI and Granite also had to be, and were found, qualified to become Commission licensees. See infra at 21-22.

of ownership is more likely to lead to diversity of programming viewpoints. The minority ownership policies at issue here are but one example of the Commission's efforts to achieve diversification of ownership and programming.

The minority ownership policies, and in particular the minority enhancement policy, are clearly narrowly tailored to achieve the Commission's and Congress' goals of enhancing programming diversity through diversification of broadcast ownership. Although the Commission previously promulgated race-neutral policies to prevent discrimination and to increase minority participation in broadcasting, none of these policies had any appreciable impact. Thus, the Commission determined that it was necessary to promote minority ownership in order to nurture minority voices and viewpoints in broadcasting.

The minority enhancement policy does not involve any quota or set aside such as this Court has found constitutionally offensive in other cases. Like the minority tax certificate policy, an applicant seeking minority enhancement in a comparative hearing must satisfy all of the Commission's licensing requirements before the benefit associated with being a minority-controlled entity may be realized. Moreover, the burden of the minority enhancement policy on non-minorities is de minimis. A non-minority is not foreclosed from broadcast ownership by virtue of the minority enhancement policy. The minority enhancement merely serves as a "plus factor" to be considered with all other factors in a comparative hearing; it does not automatically entitle a minority to become a licensee. Accordingly, the Commission's minority ownership policies are appropriately narrowly tailored to achieve the Commission's interest in diversifying ownership in order to enhance programming viewpoints.

ARGUMENT

I. THE MINORITY OWNERSHIP POLICIES ARE CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS

The Commission's minority ownership policies clearly satisfy the constitutional requirements for racial classifications. To pass constitutional muster under the "strict scrutiny" standard of equal protection analysis,[14] a racial classification must meet a two-pronged test: 1) it must be justified by a compelling governmental interest; and 2) the means chosen to effectuate that interest must be "narrowly tailored to the achievement of its goal." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (opinion of Burger, C.J.); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 274, 280 (1986) (opinion of Powell, J.).

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[14] It is arguable whether racial classifications made by the federal government and federal agencies should be subject to strict scrutiny. Although this Court has applied strict scrutiny where the racial classification was made by a state or local government, *see City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), it has not directly addressed the standard applicable to the federal government. *Amici* believe that the federal government's racial classifications deserve more deference than the strict scrutiny standard. Whatever the correct standard, however, the Commission's minority ownership policies clearly withstand strict scrutiny analysis.

A. The FCC's Minority Ownership Policies Are Justified By A Compelling Governmental Interest In Diversity Of Broadcast Ownership And Programming

The Commission's minority ownership policies, which Congress has by statute insisted be maintained,[14] serve the

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[14] There can be no doubt that the policies at issue here are those of Congresss, as evidenced by: 1) Congress' enactment of appropriations provisions for 1988, 1989, and 1990 expressly barring the FCC from reexamining, changing, or repealing the minority ownership policies, *see* Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 to 1329-32 (1987); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989); and 2) Congress' 1982 amendment of the Communications Act of 1934 to authorize the Commission to grant licenses using a random selection system with significant preferences for minority-controlled applicants "[t]o further diversify" broadcast ownership, *see* Communications Amendments Act of 1982 – National Telecommunications and Information Administration, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982); 47 U.S.C. § 309(i)(3); *see also Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce on H.R. 5373*, 99th Cong., 2d Sess. 13 (1986) (statement of Chairman Wirth) (Congress "explicitly established" and "repeatedly endorsed" minority ownership policies). *See West Michigan*, 735 F.2d at 612-13, 615; *but see Winter Park*, 873 F.2d at 362-67 (Williams, J., dissenting)

It is clear that Congress has power to act in this area pursuant to the Due Process Clause of the Fifth Amendment and the Commerce Clause. *See Fullilove*, 448 U.S. at 475; *Federal Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364, 376 (1984).

Amici believe that Congress' legislative enactments and reports clearly give the Commission's minority ownership policies Congressional stature, and that the policies should therefore be evaluated by this Court as Congressional enactments. Nonetheless, even if the policies are not Congressional enactments or Congressionally mandated, they were adopted

compelling governmental interest in advancing diversity in ownership as a means of enhancing diversity in programming service to the public.[15] *See Amendment of Sections 73.34,*

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pursuant to delegated authority and have the force of federal law. *See Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 379-80 (1969). Further, they are consistent with constitutional requirements.

[15] This Court has previously recognized two interests as sufficiently "compelling" to justify race-conscious governmental policies and programs: 1) the remedying of racial discrimination, *see Croson*, 109 S. Ct. at 721-23 (plurality opinion of O'Connor, J.); *Fullilove*, 448 U.S. at 477-78; and 2) a public university's interest in a racially diverse student body, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.). This Court has never held, however, that these are the only two interests substantial enough to pass constitutional muster in the face of an equal protection challenge. *See Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) ("certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies"). Even so, the governmental interest in programming and viewpoint diversity in this case closely parallels the governmental interest in *Bakke* in a diverse student body. *See Bakke*, 438 U.S. at 311-15. Exposure to a wide variety of viewpoints is as important for this nation's electorate as it is for a university's student body. *Id.* at 312, *citing Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues' . . .").

Further, although it is beyond the scope of this brief, *amici* believe that the Congressional enactments regarding the Commission's minority ownership policies make it clear that a second constitutional basis for these policies is to remedy racial discrimination. *See* note 14, *supra*. Congress asserted a remedial purpose for its enactments in this area, and there is also an "abundant historical basis" to support the policies. *See Fullilove*, 448 U.S. at 477-78; *see also Croson*, 109 S. Ct. at 719. Further, in promulgating its equal employment rules, the Commission suggested that such efforts might be remedial in part when it quoted the 1968 *Report of the National Advisory Commission on Civil Disorders*:

73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 F.C.C.2d 1046, 1079 (1975) [hereinafter cited as *1975 Multiple Ownership Report*]. This Court has repeatedly recognized the First Amendment value of, and compelling governmental interest in, diversity of programming. *See, e.g., NCCB*, 436 U.S. at 796, 801 (affirming against First Amendment challenge Commission's newspaper/broadcast cross-ownership rule as means to "enhance the diversity of information heard by the public"); *Red Lion*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here"); *see also Federal Communications Comm'n v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (Commission's position on review of format changes "reflects a reasonable accommodation of the policy of promoting diversity in programming"); *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 217 (1943) ("avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States").

Commission policies promoting diversification of programming rest on the belief, basic to our society, that "the

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> It would be a contribution of inestimable importance to race relations in the United State simply to treat ordinary news about Negroes as news of other groups is now treated . . . . Television should develop programing which integrates Negroes into all aspects of televised presentations . . . . While some of these steps are being taken, *they are still largely neglected*.

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C.2d 766, 775 (1968) (emphasis added); *see also id.* at 775 ("We stress that we are not condemning the broadcast media for past actions or neglect. It is fruitless to focus on the past.").

widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, 22 F.C.C.2d 306, 310 (1970) [hereinafter cited as *1970 Multiple Ownership Report*]. A central issue, therefore, is whether the Commission's minority ownership policies further the long-recognized governmental interest in diversity of programming, without running afoul of the First Amendment.

Almost since its inception, the Commission has promulgated policies and rules based on this premise that ownership and programming diversity are inextricably linked[19] – *i.e.*, that diversification of ownership will ultimately broaden the diversity of programming available to the broadcast

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[19] The significance of ownership from this First Amendment viewpoint "lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *1975 Multiple Ownership Report*, 50 F.C.C.2d at 1050; *see 1970 Multiple Ownership Report*, 22 F.C.C.2d at 311; *see also Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order*, 45 F.C.C. 1476, 1477, 1482 (1964) ("the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a . . . programming sense, on public opinion at the regional level"); *Editorializing By Broadcast Licensees*, 13 F.C.C. 1246, 1252 (1949) (authority to program enables licensee "to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts"). As the U.S. Court of Appeals for the District of Columbia Circuit stated in holding that minority status is a relevant factor in the comparative licensing analysis, "it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news." *TV 9*, 495 F.2d at 938.

audience.[17] For example, in 1953, the Commission promulgated the first of its multiple ownership rules, whose "fundamental purpose" is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints".[18] *Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, *Report and Order*, 18 F.C.C. 288, 291-92 (1953). The Commission's 1965 *Policy Statement on Comparative Broadcast Hearings* made diversification of ownership one of the two major factors to be considered in comparative licensing proceedings.[19] 1 F.C.C.2d at 394-95. The minority ownership policies are thus one part of a

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[17] In addition, the First Amendment precludes more direct means of achieving diversity of programming. *See NCCB*, 436 U.S. at 800-02; *1978 Policy Statement*, 68 F.C.C.2d at 981.

[18] The multiple ownership rules initially limited the common control of broadcast stations. The Commission's current rules include limitations on broadcast/newspaper cross-ownership, cable/telephone company cross-ownership, broadcast service cross-ownership and common control of broadcast stations. *See* 47 C.F.R. §§ 73.3555, 76.501 (1988).

The current multiple ownership rules also include a "minority incentive" in order to foster minority ownership. *See* 47 C.F.R. § 73.3555(d)(3)(iii); *Amendment of § 73.3555 [formerly §§ 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, *Memorandum Opinion and Order*, 57 Rad. Reg. 2d 966, 981-82 (1985) (multiple ownership rules play role in increasing minority ownership).

[19] The Commission has focused on diversification of control of the media of mass communications in fulfilling its responsibility to determine that the grant of a license serves "the public interest, convenience, and necessity." 47 U.S.C. § 309(a); *see 1975 Multiple Ownership Report*, 50 F.C.C.2d at 1048-49.

comprehensive regulatory framework resting on the nexus between diversity of ownership and programming.[20]

This Court has itself recognized the strong link between diversity of ownership and diversity of programming. In affirming the Commission's newspaper/broadcast cross-ownership rule, the Court in *NCCB* stated that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 796. The U.S. Court of Appeals for the District of Columbia Circuit has also repeatedly validated the Commission's promotion of ownership diversity as a means of enhancing viewpoint diversity in a variety of contexts,[21] *see, e.g.*, *West Michigan*, 735 F.2d at 610-11; *Garrett*,

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[20] In arguing that programming diversity is not a compelling governmental interest, and further, that even if it is, it has been achieved, Petitioner would undo much of the Commission's regulatory structure.

In addition, Petitioner's contention, based on the Commission's brief in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), that the FCC itself has admitted that diversity of programming has been achieved, is only partially correct. While one Commission case may have suggested that the Commission has reached that determination, the recent, only partial relaxation of the one-to-a-market and duopoly rules counsels otherwise. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, *Second Report and Order*, 4 FCC Rcd. 1741, 1751 (1989); *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, *First Report and Order*, 4 FCC Rcd. 1723 (1989).

Finally, while there may arguably be sufficient diversity in some markets, there may still be insufficient representation of minority viewpoints even amongst such diversity.

[21] Petitioner contends that application of the minority ownership policies to achieve programming diversity results in "stigmatic harm", because such application says that race determines what people want to hear and broadcasters to show, and it perpetuates stereotypes of minorities. Pet. Brf. at 37-38, 40-41. As an initial matter, Petitioner's argument assumes the premise that Petitioner is challenging in this case -- that ownership will indeed

513 F.2d at 1062-63; *TV 9*, 495 F.2d at 937-38; *see also Gottfried v. FCC*, 655 F.2d 297, 308-09 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982) (Rehabilitation Act and FCC), as has Congress. *See* H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 40, *reprinted-in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2237, 2284 (nexus "repeatedly recognized by both the Commission and the courts").

The connection between the Commission's minority enhancement policy and the important government policy favoring diversity of viewpoints and programming is thus precisely the nexus on which the Commission has built the regulatory structure governing the award of broadcast licenses and the ownership of broadcast media.

B. The FCC's Minority Ownership Policies, And Its Minority Enhancement Policy In Particular, Are Narrowly Tailored To Achieve The Goals Of Diversity Of Broadcast Ownership And Programming

A variety of factors are relevant to whether a race-conscious policy is "narrowly tailored" to achieve its goal, including "the necessity for the relief and the efficacy of

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effect programming. Secondly, Petitioner's argument is based on the clearly erroneous assumption that minority owners will somehow encourage or perpetuate racial stereotyping in their programming. One of the main reasons to broaden the diversity of owners, however, is to fight such stereotyping. Finally, owners with different backgrounds and heritages may well present programming with varying perspectives, and just as non-minority owners from different backgrounds enhance diversity, so having a full variety of minority owners – doubtless also from different backgrounds – will enhance overall programming diversity. Since minorities have been and remain acutely underrepresented in broadcasting, however, affirmative actions by the Commission, and not merely an acknowledgement that broadcast ownership is now available to everyone, are required to ensure that the full spectrum of minority viewpoints is represented in the broadcasting industry.

alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987) (opinion of Brennan, J.); *id.* at 187 (Powell, J., concurring). The Commission's minority enhancement policy is clearly narrowly tailored to further the important governmental interest in diversity of programming.

The Commission adopted its minority ownership policies[17] only after it had instituted race-neutral policies designed to prevent discrimination and increase the minority voice in broadcasting, and those policies had not succeeded. *See 1978 Policy Statement*, 68 F.C.C.2d at 980; *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), Memorandum Opinion and Order*, 82 F.C.C.2d 329, 335-37 (1980) [hereinafter cited as *Top 50*

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[17] The minority enhancement policy has its roots in the decision of the U.S. Court of Appeals for the District of Columbia Circuit in 1973 in *TV 9*, which held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." 495 F.2d at 936-38. *See also West Michigan*, 735 F.2d at 613-16 (denying equal protection challenge to minority enhancement policy).

In 1978, the Commission formally adopted the policy of considering minority ownership and participation as enhancement factors under the "best practicable service" criteria in the comparative licensing proceeding. *WPIX, Inc.*, 68 F.C.C.2d 381, 411, 412 n.31 (1978). Prior to the Commission's statements in *WPIX*, Administrative Law Judges and the Review Board followed the *TV 9* pronouncement, treating minority ownership and participation as a "plus factor" to varying degrees and in a variety of forms. *See, e.g., Gainesville Media, Inc.*, 72 F.C.C.2d 807, 814-16 (Rev. Bd. 1978); *Flint Family Radio, Inc.*, 69 F.C.C.2d 38, 46-48 (Rev. Bd. 1977); *Mid-Florida Television Corporation*, 69 F.C.C.2d 549, 598-602 (ALJ 1977).

Policy].[25] Among those unsuccessful policies were the emphasis on diversification of control in comparative licensing (without consideration of minority status), the ascertainment policy[26], and the equal employment rules.[27] *See 1978 Policy Statement*, 68 F.C.C.2d at 980-81; *Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-95; *see also* 47 C.F.R. § 73.2080 (1988) (EEO rules). In its *1978 Policy Statement*, the Commission concluded that its

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[25] In the *Top 50 Policy*, the Commission discussed its "numerous steps to further EEO [Equal Employment Opportunities] in the broadcasting industry", including the top 50 policy, the nondiscrimination and affirmative action rules, the Form 395 Annual Employment Report, the Model EEO program, ascertainment obligations, distress sales, tax certificates, and expedited processing of broadcast applications to minority-owned entities. 82 F.C.C.2d at 334-36. The U.S. Court of Appeals for the District of Columbia Circuit noted in *NAACP v. FCC* that the Top 50 policy "was not intended directly to promote these minority interests but only to ensure a diversity of program sources." 682 F.2d 993, 1003 (D.C. Cir. 1982).

[26] The ascertainment policy required broadcasters to interview members of the community on an ongoing basis to "ascertain" what issues they felt were important to the community. It was presumed that broadcasters would use that information in programming decisions. *See Ascertainment of Community Problems by Broadcast Applicants*, 53 F.C.C.2d 3 (1975).

[27] *See also Consideration of the Operation of, and Possible Changes in, the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, Second Report and Order*, 50 F.C.C.2d 829, 852 (1975) (stations should program "material particularly directed to the needs or problems of the station's community and area . . . , *including programming addressed to the special needs of minority groups*") (emphasis added).

Although Petitioner contends that no race-neutral attempts to increase programming diversity were made, it then contradicts itself, citing the Commission's former specialized programming policy, under which an applicant could show that its proposed programming addressed the special needs of minorities in the area, as one race-neutral means of serving the programming needs of minorities. Pet. Brf. at 43 & n.107. *See, e.g., J.R. Earnest and John A. Flache, D.B.A. La Fiesta Broadcasting Co.*, 6 F.C.C.2d 65 (1966); *Herbert Muschel*, 33 F.C.C. 37 (1962); *Fort Terminal Broadcasting Co.*, 6 F.C.C. 271 (1938).

ascertainment and equal employment rules were not enough, and that "ownership of broadcast facilities by minorities is *another* significant way of fostering the inclusion of minority views in the area of programming."[28] 68 F.C.C.2d at 981 (emphasis added).

The minority enhancement policy, like the tax certificate policy, provides adequate flexibility in application to pass constitutional muster. *See Winter Park*, 873 F.2d at 352-55. A minority entity wishing to receive enhancement credit during the comparative licensing proceeding must first satisfy all of the FCC's many licensing qualifications, as well as a determination that it is indeed minority-controlled. Thus, the Commission must examine the proposed licensee on a case-by-case basis to determine if grant of the license is in the "public interest."[29] Should the minority entity not meet any one of these requirements, it will be excluded from further consideration for the license. Moreover, even if the minority applicant passes muster on all basic qualifying tests, to succeed in obtaining the license, it must be judged superior to other applicants on a

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[28] The Commission in its *1978 Policy Statement* adopted the minority tax certificate and distress sale policies to help in the effort to combat the fact that "...the views of racial minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980. The Commission's recognition of the small number of minority-owned broadcast stations made necessary the institution of national policies designed to increase significantly minority ownership. *See Paradise*, 480 U.S. at 171; *cf. West Michigan*, 735 F.2d at 610-12 (goal of increasing diversity of content through diversity of ownership is national policy, operating "without regard to the size or existence of a minority population in the community of license", which is designed to ameliorate the underrepresentation of minorities within "the nation's broadcast media").

[29] The Commission's minority enhancement policy is therefore unlike the set aside in *Bakke*, where denial to Bakke "of this right to individualized consideration without regard to his race [was] the principal evil of [the University's] special admissions program." 438 U.S. at 318 n.52.

variety of race-neutral factors, including local residence, civic participation, and media ownership.[28]

In addition, as the court below found, unlike the race-conscious policies found unconstitutional in *Bakke* and *Croson*, the Commission's minority ownership policies do not involve numerical goals, quotas, or set asides. *Winter Park*, 873 F.2d at 354; *see Croson*, 109 S. Ct. at 728 ("rigid numerical quota"); *Bakke*, 438 U.S. at 316 ("fixed number of places"). The comparative enhancement for minority ownership and integration is only one factor to be considered in a comparative licensing proceeding.[29] *Winter Park*, 873 F.2d at 353; *cf. Bakke*, 438 U.S. at 317-18.

The burden of the FCC's minority enhancement policy on non-minorities is minimal. Like the minority hiring goals that this Court endorsed in *Fullilove* and *Steelworkers v. Weber*, 443 U.S. 193 (1979), the minority enhancement policy "impose[s] a

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[28] *See Comparative Broadcast Hearings*, 1 F.C.C.2d at 394 (diversification factor of primary significance); *see also Radio Jonesboro, Inc.* 57 Rad. Reg. 2d 1564, 1567-69 (1985) (minority ownership and local residence equally significant enhancement factors; applicant with 100% integration of local residents with broadcast experience and civic participation prevails over opponent with 100% minority integration enhanced by civic participation); *Horne Industries, Inc.*, 98 F.C.C.2d 601, 604 n.12 (1984) ("qualitative attributes [local residence, minority ownership, civic participation] . . . may enhance the value of an integration proposal but cannot overcome clear quantitative differences [diversification and integration]"); *Las Misiones de Bejar Television Co.*, 53 Rad. Reg. 2d 119, 121-22 (Rev. Bd. 1983) (100% minority-owned applicant proposing 12.5% integration comparatively inferior to 90% integrated, non-minority applicant).

[29] Similarly, while any transfer of a license offers a potential opportunity for application of the tax certificate policy, many other factors enter into the sale of a broadcast property that may make the tax certificate unattractive, or not attractive enough to surmount other considerations, to the seller. That the tax certificate policy does not involve any "set aside" certainly makes it even more narrowly tailored and less constitutionally troublesome than the minority program approved in *Fullilove*.

diffuse burden [on third parties], often foreclosing only one of several opportunities." *Wygant*, 476 U.S. at 283. Such a burden is constitutionally permissible: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove*, 448 U.S. at 484, *quoting Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 (1976); *see Wygant*, 476 U.S. at 281-83.

The minority enhancement policy is akin to the "plus factor" spoken of approvingly in *Bakke*, and is merely one of several factors to be considered during the comparative licensing proceeding. *See* 438 U.S. at 317-18. It does not foreclose non-minorities from filing applications and competing and being considered for a broadcast license in a comparative proceeding. *See Bakke*, 438 U.S. at 318. It does not enable an unqualified minority or a sham "minority" entity to obtain a broadcast license. *See, e.g., Metroplex Communications, Inc.*, 4 FCC Rcd. 8149 (Rev. Bd. 1989). It does not override all other comparative factors. *See WPIX, Inc.*, 68 F.C.C.2d at 411; *see also Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-97. Rather, the minority enhancement policy will only tip the balance for the minority applicant over an otherwise equally qualified non-minority.[29] *Winter Park*, 873 F.2d at 353; *see*

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[29] Like the minority enhancement policy, the tax certificate policy creates at most a minimal burden on non-minorities. No non-minority entity is foreclosed from bidding on and buying a broadcast station under the policy. In many cases, the burden on non-minorities is non-existent. The tax certificate is not an inducement to many sellers. As noted above, both CIRI and Granite have made losing bids on various broadcast properties which were later sold to non-minorities, either because the non-minorities' bids adequately compensated for the tax certificate price, or because the seller did not value the tax certificate.

Further, while the tax certificate policy creates an incentive for certain licensees to seek out minority purchasers, there is no requirement that they do so. Once the seller has selected a buyer, the Commission is precluded from

Bakke, 438 U.S. at 318 (non-minority losing seat in class to minority "would mean only that his combined qualifications, which may have included similar nonobjective factors [to ethnic background], did not outweigh those of the other applicant").

The Commission's minority enhancement and other minority ownership policies are clearly narrowly tailored to achieve the Commission's and Congress' interests in diversifying control of the media of mass communications and thereby diversifying programming viewpoints to meet the needs, interests, and problems of the individual community.

CONCLUSION

The Court should affirm the decision of the court below that the FCC's comparative enhancement for minority ownership and integration in broadcast licensing proceedings is constitutional. The Commission's minority ownership policies, including the minority enhancement and tax certificate, serve

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considering whether the public interest would be better served by a sale to another party. *See* 47 U.S.C. § 310(d) (in acting on transfer or assignment application, "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee").

the Commission's and Congress' compelling interest in diversity of ownership of broadcast stations and diversity of programming and viewpoints, and are narrowly tailored to achieve those goals.

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OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE CAPITAL CITIES/ABC, INC. IN SUPPORT OF RESPONDENTS *

INTEREST OF AMICUS CURIAE

Capital Cities/ABC, Inc. is the licensee and owner of a number of radio and television broadcast stations, a television network and several radio networks. Among the broadcast stations affiliated with Capital Cities/ABC's networks are several owned and controlled by individuals of minority race.[1]

* Written consent to the filing of this brief has been obtained from counsel for all parties. Copies of the letters of consent have been filed with the Clerk of this Court.

[1] In 1986, 3 of the 21 television stations in the United States owned or controlled by blacks were ABC affiliates. 4 of the 6 television stations owned or controlled by Asian-Americans were ABC affiliates. 1 of the 8 television stations owned or controlled by Hispanics, and 1 of the 3 television stations owned or controlled by Native Americans, were ABC affiliates. National Association of Broadcasters, *Minority Broadcasting Facts* at 9-10 (Sept. 1986).

On its own initiative, Capital Cities/ABC has sought to assist minorities to become successful owners of broadcast stations. Capital Cities Communications, Inc. acted as mentor to Seaway Communications, Inc., a company created by a number of black professional and business men and women in 1977 with $1 million of personal capital, in which Capital Cities has no stock ownership or management position. Capital Cities provided counsel to Seaway in examining and analyzing available television properties. Ultimately, on April 24, 1979, Seaway received the approval of the Federal Communications Commission ("FCC") to acquire 100 percent of the stock of Northland Television, Inc., licensee of WAEO-TV, Channel 12 (NBC), Rhinelander, Wisconsin, in the first application of the FCC's distress sale policy, which had been adopted in the previous year. This was also the first instance in which the FCC had ever granted an operating license for a network-affiliated VHF television station to a 100 percent minority-owned company.[2] Seaway has, since that time, not only continued to operate its Rhinelander station but has acquired a television station in Bangor, Maine, WVII-TV.

Capital Cities/ABC also has direct experience with the tax certificate policy. When Capital Cities/ABC was formed in 1986, it transferred to minority-owned or controlled purchasers three broadcast stations—WTNH (TV) (New Haven, Connecticut), WKBW-TV (Buffalo, New York), and WRIF (FM) (Detroit, Michigan)—as well as cable television systems in Michigan. The FCC approved the issuance of tax certificates under 26 U.S.C. § 1071 to these minority purchasers. The tax certificate policy here played a significant role in bringing more minority owners into broadcasting.

Capital Cities/ABC believes, based on its extensive experience in the broadcasting industry and in dealing

[2] *See* Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, *Final Report to the Federal Communications Commission* at 31 (1982) ("*Advisory Committee Report*").

with its own minority-owned affiliates, that policies preferring minorities for ownership of newly allocated or voluntarily transferred broadcast stations are on the whole beneficial to the industry, and contribute substantially to greater diversity of viewpoints in broadcasting. The federal government's efforts to bring more minority viewpoints to the airwaves by increasing minority ownership are, in our view, far preferable to direct regulatory intervention in programming judgments, avoiding intrusion on broadcasters' First Amendment liberties. These policies should be continued, and the shadow over their constitutionality lifted by this Court.

SUMMARY OF ARGUMENT

Congress, for the past three years, has commanded the Federal Communications Commission by law to maintain and apply minority ownership preferences in broadcast licensing. Thus, in considering the constitutionality of the comparative hearing preference, this Court should accord the same high degree of deference that is due to any act of Congress on the sensitive subject of affirmative action, and was accorded in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Deference to Congress is particularly important in regulation of broadcasting, an industry that is unique both because of its pervasive role in informing Americans, and because of its special status as a government-licensed medium. The FCC presides over the licensing and relicensing of a limited number of broadcast frequencies. In doing so, it must select licensees who will best serve the "public interest." This regulatory scheme has long been recognized and approved by this Court. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). First Amendment considerations strongly support the policy of seeking diversity in station ownership rather than interfering directly in programming decisions.

Congress's minority preference policies are supported by the dual objectives of increasing diversity of view-

points in broadcasting, and overcoming the historic barriers to minority entry in broadcasting that are attributable to longstanding societal discrimination. These objectives are intertwined and together establish the "compelling interest" called for by *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Congress's conclusion that there is a nexus between increasing minority ownership and fulfilling these legitimate objectives represents a predictive judgment well within the legislative capacity and consistent with traditional broadcast regulation. Finally, the comparative hearing preference is more effective than race-neutral alternatives that have been considered, is not unduly burdensome on nonminorities, and is carefully administered to ensure against abuses; it is therefore "narrowly tailored" and should be upheld under this Court's precedents, including *Croson*.

ARGUMENT

Broadcasting is unique among American institutions in its ability to inform the public. It is also unique because the federal government plays a crucial role in distributing the limited number of broadcast licenses that are available, under a statutory and regulatory framework repeatedly upheld by this Court. Thus, Congress has determined that the limited representation of the diverse viewpoints of racial minorities in broadcasting, in large part the result of historic societal discrimination and the lasting burdens such discrimination still imposes on minorities today, calls for a response by government. Congress and the FCC have sought to increase the representation of minority viewpoints on the airwaves through specific policies targeted at increasing minority ownership in broadcasting.

This Court, in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), has reaffirmed that race-conscious programs to benefit minorities are not constitutionally invalid *per se*, *id.* at 720, 729 (opinion of O'Connor, J.), 730 (Stevens, J., concurring in part and concurring in the judgment), 734 (Kennedy, J., concurring in part

and concurring in the judgment), while at the same time holding that such programs—at least where initiated by state or local governments—must both satisfy a "compelling interest" and be "narrowly tailored." *See id.* at 723-29. Here, Congress is well within its constitutional authority in requiring the FCC to take account of race in its efforts to encourage minority ownership in broadcasting.

I. Congress's Minority Preference Policies on Broadcast Station Ownership Are Based on a Compelling Need to Overcome the Adverse Consequences that Societal Discrimination Has Had on Minority Ownership and, Therefore, on Diversity of Broadcasting Viewpoints

A. *Congress Has Mandated These Programs by Law*

The minority preference policies at issue, though originally created and still implemented by the FCC, are now clearly Congress's policies, having been mandated continuously for several years through specific legislation. In 1987, responding to the possibility that the FCC might abolish its minority preferences, Congress directed:

> "That none of the funds appropriated by this Act [Continuing Appropriations, Fiscal Year 1988] shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C. 2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings which were suspended pending the conclusion of the inquiry;" [3]

[3] Pub. L. 100-202, 101 Stat. 1329, 31-32 (1987).

The same language has been reenacted each year to the present.[4] Congress has thus affirmatively commanded the FCC to maintain and carry out each of the three minority preference policies it specifically identified in the legislation, including comparative enhancements and distress sales. The FCC has expressly recognized that its decision to reinstate the comparative enhancement, distress sale and tax certificate policies, and to terminate its proceeding reconsidering them,[5] was taken in order to comply with this legislation.[6] Majorities of both panels of the D.C. Circuit below similarly recognized that these policies are congressionally mandated.[7]

Congress's repeated direction to the FCC to maintain the minority ownership preferences at issue is but the latest reflection of its continuing support for race-conscious efforts to aid minority broadcast ownership. In the Communications Amendments Act of 1982, authorizing the FCC to select certain new station licensees by lottery, Congress specifically directed that "significant preferences" be granted to any lottery applicants "the

[4] *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 988, 1020-21 (1989).

[5] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd. 1315 (1986), *modified*, 2 FCC Rcd. 2377 (1987) ("*Race and Gender Preference*").

[6] *Metro Broadcasting, Inc.*, 3 FCC Rcd. 866 (1988), *aff'd sub nom. Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

[7] *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), *cert. granted in part sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990); *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 932 (MacKinnon, J., concurring in judgment), 938 (Wald, C.J., dissenting) (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 715 (1990).

grant to which of the license or permit would increase the diversification of ownership of the media of mass communications," and that "[t]o further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group."[8] Because Congress in that instance was enacting a preference as part of a new mechanism for distributing licenses, rather than maintaining preferences in existing areas, it dealt more fully with the rationale for race-conscious efforts to encourage minority ownership. Its analysis of the need for a race-conscious policy, as discussed below, is equally applicable to the preferences at issue here: indeed, in the legislative history Congress repeatedly referred to the statements by the FCC and the courts in support of the existing preferences as part of the basis for the new one it was creating.[9]

B. *The Minority Preference Policies Are Supported by Both Diversity and Remedial Interests Operating in Conjunction*

The opponents of minority ownership preferences seek to create a false dichotomy between the remedial and diversity objectives underlying these programs. While they argue that neither alone is sufficient to establish a "compelling need,"[10] they fail to consider that the two objectives are in fact intertwined. Congress well understood this point, as the legislative history demonstrates. The aims of remedying societal discrimination and promoting viewpoint diversity support one another, and together establish the requisite need for race-conscious remedies here.

[8] Communications Amendments Act of 1982, Pub. L. 97-259, § 115, 96 Stat. 1087, 1094 (1982) (codified at 47 U.S.C. § 309(i)(3)(A)).

[9] H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. at 40-44 (1982).

[10] *See, e.g., Shurberg*, 876 F.2d at 912-15, 919-25 (opinion of Silberman, J.); Brief for the United States as Amicus Curiae Supporting Petitioner at 17-29.

This unusual conjunction of remedial and forward-looking aims arises because of the very special characteristics of broadcasting, which enjoys a unique status as a government-licensed medium of communications as well as a unique ability to inform the viewpoints and perspectives of the American public.[11] Indeed, this Court has acknowledged the "uniquely pervasive" influence of broadcasting on American society. *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989), *quoting Pacifica Foundation*, 59 F.C.C.2d 892 (1976).

That influence gives rise to a need for a plurality of voices on the airwaves, as this Court also has long acknowledged. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). In light of these concerns of constitutional dimension, broadcasters occupy the status of public trustees under the Communications Act of 1934, 47 U.S.C. § 151 *et seq. See FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984). And Congress has long reposed considerable discretion in the FCC to ensure that the unique diversity goals of broadcast licensing under the Communications Act are met. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978). Because of the complex balancing of First Amendment interests necessary in broadcasting, this Court affords "great weight" to the judgments of Congress as well as the experience of the FCC. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

The FCC has "traditionally considered the underrepresentation of minority points of view over the airwaves

[11] Radio and television penetrate virtually all American homes; some 99% of households have radio sets and 98% have television sets. Radio Advertising Bureau, *Radio Facts 1986-87* at 3; 57 *Television & Cable Factbook (Cable & Services Volume)* at C-331 (1989).

as detrimental to minorities and the general public," and it adopted the minority ownership preferences now mandated by Congress with the intent of increasing diversity of viewpoints through increasing diversity of ownership.[12] Bringing more minority viewpoints into broadcasting, the FCC has found, would serve both statutory and constitutional goals:

> "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." [13]

Justice Stevens' conclusion in *Croson* that "the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future," 109 S. Ct. at 730 (Stevens, J., concurring in part and dissenting in part), is particularly pertinent in the area of broadcasting, which plays such a central role in informing the views of Americans on public issues, including the continuing controversies over race and the role of minorities in our society.

While the FCC's justification for minority ownership preferences was essentially forward-looking, stressing the

[12] *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 849-50 (1982) (*"1982 Policy Statement"*). The FCC has also characterized its goal as "expand[ing] program diversity"; however, it appears that this term does not represent a separate and distinct objective, but is used interchangeably with "viewpoint diversity." *See, e.g., Race and Gender Preferences*, 1 FCC Rcd. at 1317. The FCC is concerned —rightly—not with some arbitrary quantity of entertainment programming, but with the more subtle, and far more important, benefits to be had from a presentation of minority views, perspectives and opinions by minorities themselves, not through a sieve of white editors and programmers.

[13] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (*"1978 Policy Statement"*).

benefits to be realized both by minorities and by the public generally from viewpoint diversity, the need for a race-conscious ownership policy in this area arises because this nation's regrettable history of societal discrimination against minorities has had a discernible impact on the broadcasting industry. Congress's decision to extend the mantle of its own authority to the minority preferences at issue is crucial because Congress, unlike any state or political subdivision, has the power to "identify and redress the effects of society-wide discrimination." *Croson*, 109 S. Ct. at 719 (opinion of O'Connor, J.). *See also Fullilove v. Kutznick*, 448 U.S. 448, 499 (1980) (opinion of Powell, J.) ("Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society.").[14]

Congress's choice of responses to the problem of discrimination must be accorded "great weight." *Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J.), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. Congress's power to deal with the effects of past discrimination as perpetuated in the present, *see Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.), need not be exercised in a color-blind fashion, for "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Id.* at 482-83.

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[14] The Department of Justice, in contending that generalized societal discrimination is not sufficient to sustain a minority preference program, Brief for the United States as Amicus Curiae Supporting Petitioner at 21-22, conveniently ignores the above language in *Croson* and *Fullilove*, relying instead on Justice Powell's statements in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.), where the power of Congress was in no way implicated.

Because of Congress's crucial role in authorizing the minority preferences at issue, there is no need to consider what power the FCC would have had to implement such a program entirely on its own.

In enacting the minority preference for license lotteries, Congress was well aware that racial minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties."[15] Thus, Congress in creating the lottery preference meant to ensure that "minorit[ies] . . . that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so."[16] That underrepresentation is directly attributable to past discrimination. In the Conference Report on the lottery legislation, Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well."[17] Thus, Congress conceived of the lottery preference as a means of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications,"[18] and its reasoning is equally applicable to the preferences at issue here.

At the time most broadcast licenses were granted, including those in the most valuable markets, overt discrimination against racial minorities was unquestionably commonplace in our society.[19] While one need not accept as true everything that has been said about the effects of

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[15] H.R. Conf. Rep. No. 765 at 43.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 44.

[19] *See* Brief for Federal Communications Commission at 30 in *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700. As of mid-1973, licenses for 66.6% of the commercial television stations—and 91.4% of the VHF stations—that existed in mid-1989 had already been awarded. 68.5% of the AM and FM radio station licenses authorized by the FCC as of mid-1989 had already been issued by mid-1973, including 85% of the AM stations. *See* 39 FCC Ann. Rep./Fiscal Year 1973 at 194, 197.

discrimination in broadcasting,[20] it would be blinking reality to suppose that there was no such effect. Minority ownership in broadcasting is still but a tenth of minority representation in the population.[21] This glaring disparity cannot be dismissed as some hypothetical aversion of minorities to the broadcasting business, for minority business ownership is similarly low throughout the American economy.[22] Rather, the evidence is conclusive that minority entry into broadcasting has been frustrated by very limited access to financing,[23] and this in turn is traceable to the continuing effects of our legacy of societal

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[20] *See, e.g.*, O. Kerner, *Report of the National Advisory Commission on Civil Disorders* at 201-12 (1968); United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing on the Set: An Update* (1979).

[21] Minorities constitute some 23% of the population of the United States, yet, as of 1986, they owned just over 2% of the nation's radio and television stations. *See* National Association of Broadcasters, *Minority Broadcasting Facts* at 6. Even the most optimistic recent assessment places minority ownership at no more than 3.5% of the total broadcast stations. Congressional Research Service, *Statistical Analysis of FCC Survey Data re: Minority Broadcast Station Ownership and Minority Broadcasting* at 42 (1988) (*"CRS Report"*). Moreover, these quantitative statistics do not take into account the limited markets served by most minority broadcasters, as late entrants who usually have been able to obtain only the less valuable stations.

[22] According to data published in 1982 by the Census Bureau, of the total number of businesses in the United States, blacks owned 2.3%, Hispanics 1.7%, and Asian-Americans 1.76%—all well below their representation in the population. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises*, MB 82-1 at 90, MB82-2 at 197-99, MB82-3 at 221-23.

[23] "[T]he pressing dilemma minority entrepreneurs face" is the "lack of available financing to capitalize their telecommunications ventures." *1982 Policy Statement*, 92 F.C.C.2d at 856. *See, e.g.*, Minority Ownership Taskforce Report, *Minority Ownership in Broadcasting* at 11-12 (May 17, 1978) (*"Taskforce Report"*); *Advisory Committee Report* at i, 9, 19, 25; Testimony of Roy M. Huhndorf, Chairman, Cook Inlet Region, Inc. Before the Senate Subcommittee on Telecommunications at 10 (Sept. 15, 1989) (*"Cook Inlet Testimony"*) (discussing how tax certificate policy vital to acquisition of broadcast station by corporations owned by Alaskan Natives).

discrimination.[24] Here, the Court is not confronted with a general policy of handing out broadcast licenses arbitrarily to various ethnic groups on the basis of "diversity" alone. Rather, Congress has made a focused decision to increase viewpoint diversity by aiding members of minority groups, which have been discriminatorily excluded from the mainstream of American society, to enter into broadcasting.

Those who contend that diversity can play no part in justifying a preference for minority ownership in broadcasting ignore this Court's leading decisions, as well as the great weight due to Congress's judgments. The FCC has found the diversity interest in this area to be "compelling," [25] and Congress, as the legislative record demonstrates, is in agreement. Those conclusions cannot be ignored, in light of this Court's own observation, in *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976), that the FCC's equal employment opportunity regulations are supported by the FCC's "obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."

The validity of using a race-conscious program to achieve diversity of viewpoints also finds direct support in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where five members of this Court agreed that a color-blind medical school admissions policy was not required and reversed the district court's injunction to that effect. Since there was no showing that the University or the medical school had engaged in racial discrimination, and the Regents had no power to remedy societal discrimination, *id.* at 305, 310 (opinion of Powell, J.), *Bakke* must rest on the

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[24] *See, e.g., Taskforce Report* at 7-8; *Cook Inlet Testimony* at 13.

[25] *Race and Gender Preferences*, 1 FCC Rcd. at 1317.

conclusion that a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious program may be predicated. *Id.* at 311-13 (opinion of Powell, J.).

While the Court has yet to uphold a race-conscious program specifically on the basis of viewpoint diversity, the Court's other constitutional affirmative action cases, typically involving employment programs or set-asides in government contracting, to date have afforded no real opportunity to do so.[26] Moreover, this Court has never ruled out justifying race-conscious programs on grounds other than remedying past discrimination.[27]

The diversity goal in *Bakke* was supported by the substantial First Amendment interest in academic freedom.

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[26] Viewpoint diversity, as a basis for a race-conscious program, should not be confused with the now-discredited "role model" argument for affirmative action, *see Croson*, 109 S. Ct. at 723 (opinion of O'Connor, J.). The Court's rejection of the "role model" theory reflects a concern that race-conscious programs not be implemented throughout American society on the basis of statistical disparities alone, *id.*, whereas the diversity rationale is particularly appropriate to a governmentally licensed regime in which a central obligation is to ensure the free interchange of ideas and dissemination of views.

[27] *See, e.g., Croson*, 109 S. Ct. at 730 (Stevens, J., concurring in part and dissenting in part) ("I . . . do not agree . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong"), 744-45 (Marshall, J., joined by Brennan, J. and Blackmun, J., dissenting) ("[t]he more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 287 (O'Connor, J., concurring in part and concurring in the judgment) ("although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest . . . . certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests . . . to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

438 U.S. at 312 (opinion of Powell, J.). In the area of broadcasting, the First Amendment concerns supporting viewpoint diversity operate with, if anything, greater force. "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 795, *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 122, while the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The public has a First Amendment interest in receiving a "balanced presentation" of views on diverse matters of public concern. *FCC v. League of Women Voters*, 468 U.S. at 385.

The First Amendment interest in diversity is particularly relevant to the regulation of the broadcasting industry by Congress and the FCC because it is well established that the government's role in distributing a limited number of broadcast licenses is not merely that of a "traffic officer." *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-16 (1943). Rather, from the first days of the Communications Act and earlier, the system of broadcast regulation in this country has been predicated on advancing the "public interest,"[28] and Congress has accorded the FCC responsibility for "determining the composition" of traffic on the spectrum as

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[28] "The ether is a public medium, and its use must be for public benefit. The use of radio channel is justified only if there is public benefit." Secretary of Commerce Herbert Hoover, *Proceedings of the Fourth National Radio Conference, Washington, D.C.*, Nov. 9-11, 1925 (Washington, D.C.: Government Printing Office, 1976) at 7. As the courts have held from the inception of spectrum regulation, broadcasting "is impressed with a public interest and . . . because the number of available broadcasting frequencies is limited, the [Radio Commission] is necessarily called upon to consider the character and quality of the service to be rendered." *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

well as supervising its orderly flow. *National Broadcasting Co.*, 319 U.S. at 215-16. In light of the unique characteristics of this industry, a decision by this Court recognizing the special importance of promoting diversity of viewpoint in broadcasting through minority ownership preferences would hardly operate as a wholesale invitation to the adoption of race-conscious programs throughout American society.

Finally, there is no risk that minority preferences in broadcast ownership will result in the sort of stigmatization that concerned several members of the Court in *Croson*, 109 S. Ct. at 712 (opinion of O'Connor, J.), prompting their insistence that only remedial objectives could justify the race-conscious set-asides at issue there. Whatever the risk of stigma in employment or contracting decisions, where selection is based in substantial part upon an evaluation of individual merit—and minority set-asides or other race-conscious programs might be taken by some to imply that minorities are not as capable as whites—stigmatization concerns are irrelevant to entry-oriented *ownership* policies such as these. The minority preferences Congress has mandated are predicated on minorities' relative lack of access to purchase and start-up financing compared with whites, a situation which is in turn the consequence of societal discrimination. The test of a broadcaster's real capabilities and skills comes not at initial entry but in actual operation in the marketplace, and in that contest all broadcasters, minorities as well as whites, stand on an equal footing; who thrives or fails is not a concern of Congress or the FCC.

II. There Is a Substantial Nexus Between the Goal of Increasing Viewpoint Diversity and Minority Ownership Preferences

Congress, the courts and the FCC have all concluded that a nexus exists between the compelling need to remedy the lack of minority viewpoints in broadcasting, and the minority ownership preference policies at issue. In

enacting the lottery preference policy in 1982, Congress clearly recognized that there is a nexus between diversity of media ownership and viewpoint diversity.[29] Similarly, the report of the Senate Appropriations Committee on the legislation commanding the very policies at issue states that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences," and refers for further support to the earlier enactment of the lottery preference.[30] Congress is under no obligation to compile a more detailed record or make findings as in administrative or legal proceedings. *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.), 502 (opinion of Powell, J.). The Department of Justice's approach, while pretending deference to Congress, would in fact treat the national legislature as little better than a district court or regulatory agency.[31]

This Court is entitled to consider the "total contemporary record" available to Congress, *Fullilove*, 448 U.S. at 503 (opinion of Powell, J.), in assessing the basis for

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[29] H.R. Conf. Rep. No. 765 at 40.

[30] S. Rep. No. 182, 100th Cong., 1st Sess. at 76-77 (1987). *Accord* 133 Cong. Rec. S14395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). In debates on the appropriations legislation for fiscal year 1989, continuing the requirement of the minority preference policies, Senator Hollings further elaborated on the existence of a "nexus between minority/female ownership and program diversity." 134 Cong. Rec. S10021 (daily ed. July 27, 1988) (statement of Sen. Hollings). Senator Hollings offered as evidence of that nexus a report by the Congressional Research Service which examined data obtained by the FCC from broadcasters, and, as Senator Hollings concluded, demonstrated that "minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." *Id.* Earlier, Senator Lautenberg had also recognized in hearings on the fiscal year 1988 legislation that minority-owned stations "serve a very important need to express a particular viewpoint," and observed that diversity of views, backgrounds and interests could be effectively promoted through increasing minority ownership. Hearings on S. 98 Before a Subcommittee of the Senate Committee on Appropriations, 100th Cong., 1st Sess. 17 (1987).

[31] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 13-16.

its decision to mandate minority preferences in broadcast ownership. Here, the legislative history demonstrates that Congress was well aware of the prior proceedings in the courts and before the FCC, and that evidence lends additional weight to Congress's judgment. The D.C. Circuit, in *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), had concluded that minority ownership should be given weight in the comparative hearing process in light of the "connection between diversity of ownership of the mass media and diversity of ideas and expressio required by the First Amendment." Likewise, the FC had found that "[f]ull minority participation in the ow rship and management of broadcast facilities results i a more diverse selection of programming." [32] The tota body of evidence here is substantial, as was the evidence Congress had before it in enacting the minority business enterprise set-asides upheld in *Fullilove*. *See* 448 U.S. at 478 (opinion of Burger, C.J.), 503-06 (opinion of Powell, J.).

The conclusion reached by Congress, and earlier by the courts and the FCC, that greater minority ownership is likely to lead to greater viewpoint diversity, represents a predictive judgment about the overall result of minority entry into broadcasting, not a stereotyped assumption of how mi rity owners will behave in every case, as Chief Judge Wald has recognized.[33] Such a predictive judgment is legitimate, as was Justice Powell's belief in *Bakke* that greater admission of minorities would, on average, contribute to a more active exchange of views and learning, *see* 438 U.S. at 312-13 & n.48, even though not every individual of minority race would necessarily make a contribution. While minority station owners may well be guided as much as whites by market demand in their choice of entertainment programming, it is reasonable for Congress to conclude that there will be differences in the more important matters of presentation of news, edi-

[32] *1978 Policy Statement*, 68 F.C.C.2d at 981.

[33] *Shurberg*, 876 F.2d at 944-45 (Wald, C.J., dissenting).

torial viewpoint and opinion, particularly on questions affecting minority owners as minorities. Conclusive proof of this proposition may well be neither practical nor desirable, in light of the First Amendment's restraints on direct governmental supervision of broadcasters' editorial judgments. But it would ill accord with the deference owed to Congress for the Court to rule that this judgment lies beyond Congress's power to make.

These minority preferences do not represent a novel departure, but readily fit within the overall framework of broadcast regulation. The finding of a nexus between viewpoint and ownership is consistent with the FCC's general assumption behind its multiple ownership policies —repeatedly sustained by the courts—that, on average, greater viewpoint diversity will occur through diffusion of ownership. *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 780. Minority preferences are also consistent with the governing assumption of the FCC's comparative licensing process that factors other than money and market forces—for example, integration of ownership and management, local residence, and civic participation—are all likely to affect a broadcaster's service to the community. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394-400 (1965).

There is no plausible basis for distinguishing the significance of the diversity interest in the academic context from that presented here, as some opponents of these programs have sought to do.[34] For what matters is the diversity of the viewpoints themselves, and not necessarily whether they are identified to the public as those of a minority individual—although, quite often, citizens are aware of who owns the broadcast stations in their community. The minority ownership preferences cannot be dismissed as aiding only a handful of wealthy entrepreneurs. Their direct beneficiaries are, of course, dis-

[34] *See, e.g.*, Brief of Galaxy Communications, Inc. as Amicus Curiae in Support of Petitioner at 7-8.

crete individuals, but there is clear evidence that those individuals have a broader effect on the stations they own. In particular, there is a strong correlation between minority ownership of a broadcast station and employment of minorities in managerial and other important roles that can directly influence station policies.[35] Moreover, it should be self-evident, even absent any specific finding, that both minority and non-minority station employees will work with an eye to the characteristics of the station owner, and will be more sensitive to minority perspectives and concerns when they are accountable to a minority individual for their conduct. Not only in employment does ownership make a difference; in the broadcast industry, station owners frequently interact with advertisers and program suppliers (including networks) and others who affect the content of the material that is aired.

III. The Minority Ownership Preferences Constitute a Narrowly Tailored Means of Achieving Congress's Legitimate Goals

The Department of Justice's argument that deference is due only to Congress's assessment of compelling need,

[35] For example, black-owned radio stations have hired blacks in top management and other important job categories at far higher rates than have white-owned stations, even those with black-oriented formats. The same has proven true of hiring of Hispanics at Hispanic-owned stations, compared to Anglo-owned stations with Spanish-language formats. *Proceedings from the Tenth Annual Telecommunications Policy Research Conference* at 88-89 (1983). As of September 1986, half of the 14 black or Hispanic general managers of TV stations in the United States worked at minority-owned or controlled stations. National Association of Broadcasters, *Minority Broadcasting Facts* at 9-10, 55-57. In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic managers, and 42% of the Anglo-owned stations had no Hispanic managers at all. Schement & Singleton, *The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio*, 31(2) J. Comm. 78, 80-81 (1981). The success of minority-owned stations in minority hiring owes much to their deliberate efforts. *See, e.g., Cook Inlet Testimony* at 7-8, 11-12.

but not to Congress's choice of remedy,[36] flies in the face of this Court's recognition in *Fullilove* that "'[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power,'" 448 U.S. at 480 (opinion of Burger, C.J.), *quoting National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.). Congress enjoys "discretion to choose a suitable remedy for the redress of racial discrimination," and is not "limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508 (opinion of Powell, J.). Here, Congress's choice of minority ownership preferences to meet a compelling need for viewpoint diversity in broadcasting is well within the bounds of reasonable discretion.

The enhancements given to minority applicants in comparative hearings clearly satisfy the Court's "narrowly tailored" requirement. They represent a direct means of overcoming minorities' lack of financial resources by awarding new station licenses for which no payment is demanded. They have brought minority owners into broadcasting to an extent that race-neutral alternatives cannot match, and without unduly burdening non-minorities. However, only a limited number of new stations are available, and those are often in less desirable markets or on less desirable spectrum (*e.g.*, UHF).[37] Because most acquisitions must continue to be by purchase of existing stations, Congress has also found a need for the distress sale and tax certificate policies, which function as partial subsidies to minority purchasers. While we do not address those policies separately, Capital Cities/ABC's own experience in assisting Seaway Communications and in sales of stations to minorities involving tax certificates, *see supra* at 2, demonstrates the important role that these other minority preferences can play.

[36] Brief for the United States as Amicus Curiae Supporting Petitioner at 15.

[37] *See supra* note 19.

A. *Ownership-Focused Minority Preferences Are a More Effective Means than Race-Neutral Alternatives Available to Congress and the FCC*

This Court has required that a governmental body attempt some "consideration" of race-neutral alternatives before adopting a race-conscious program to benefit minorities. *Croson*, 109 S. Ct. at 728. Here, while it is clear that minority ownership preferences have succeeded in bringing more minority owners into broadcasting,[38] the evidence is equally strong that the FCC not only considered, but actually instituted, a number of race-neutral alternatives, and concluded that those alternatives were not enough in themselves. Thus, Congress is on sound footing in opting for focused race-conscious measures.

Before 1978, when it adopted the distress sale and tax certificate policies, the FCC had for a decade required licensees to institute equal employment opportunity programs,[39] and it also had required licensees to conduct discussions with significant groups in their communities, including minority leaders, to ascertain programming

[38] Over the past decade since the FCC's distress sale and tax certificate policies were instituted (during which time the comparative enhancement has also been in force), minority ownership in broadcasting has doubled, though it still remains unacceptably low. In 1978, less than 1% of commercial broadcast licenses were in the hands of minorities, *Taskforce Report* at 8-9, compared with the 2% or more of broadcast licenses held by minorities today. National Association of Broadcasters, *Minority Broadcasting Facts* at 6. According to the findings of the Congressional Research Service, at least 19.8% of all minority-owned stations were acquired through one of the three minority ownership preferences; the FCC's own figures indicate an even higher total. *CRS Report* at 41 & n.5, 45.

[39] *See Nondiscrimination in Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C.2d 766 (1968).

needs.[40] Moreover, for several decades before instituting the comparative hearing preference or any of its other minority preferences the FCC had imposed a variety of race-neutral restrictions on multiple ownership of broadcast stations.[41] The FCC was conscious in adopting its minority preference policies of the undesirability of attempting to force viewpoint diversity by more overt means, noting that "affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions."[42] Notwithstanding its earlier race-neutral efforts, the FCC concluded in 1978 "that the views of racial minorities continue to be inadequately represented in the broadcast media."[43] Thus, the minority preference policies came into being in the context of careful consideration of other alternatives and their inappropriateness or limited effectiveness.

B. *The Minority Ownership Preferences at Issue Represent the Least Burdensome Means of Achieving Congress's Goals*

Several decisions of this Court have indicated that any race-conscious plan to benefit minorities must avoid undue burdens on innocent parties. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 282 (1986) (opinion of Powell, J.); *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 481 (1986) (opinion of Powell, J.). Minority preferences in comparative hearings are comparable to the hiring goals discussed in *Wygant*, in that no potentially interested

[40] *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419 (1976). Formal ascertainment requirements for broadcasters were modified or lifted during the 1980s.

[41] These rules are presently embodied in 47 C.F.R. § 73.3555 (1989) (multiple ownership).

[42] *1978 Policy Statement*, 68 F.C.C.2d at 981.

[43] *Id.* at 980.

party can point to "settled expectations" disrupted by the award of the preference. 476 U.S. at 282-83 (opinion of Powell, J.). Prospective new broadcasters have no right to a license, while Congress and the FCC may deny a license on a variety of "public interest" grounds, *Red Lion*, 396 U.S. at 389-90, including the determination that licensing the frequency to another would better promote viewpoint diversity.

In opting for these discrete preferences, Congress has declined the far more burdensome alternative of displacing incumbent licenses in order to accommodate minority owners. The FCC has long granted incumbent licensees a renewal expectancy based on meritorious service, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 805, an expectancy that is not overcome on the basis of any minority preference. To redistribute existing licenses to minorities would be far more akin to the layoffs condemned in *Wygant* for disproportionately burdening particular individuals. 476 U.S. at 282-83 (opinion of Powell, J.). Because the nexus that Congress has recognized between diversity of ownership and diversity of viewpoint is a prediction about average behavior, rather than a judgment about individual licensees, displacing incumbent licensees in favor of minorities might well give rise to constitutional objections that the present programs do not.

The opponents of these minority preferences grossly exaggerate their burden on third parties, relying on Judge Silberman's notion that each broadcasting station constitutes a unique business opportunity.[44] That argument does not reflect the nationwide character of the broadcasting industry; not only the major group owners, but countless smaller broadcasters as well, have acquired stations in several different markets because those stations are considered to be sound business investments.[45] While individuals new to broadcasting may well

[44] *Shurberg*, 876 F.2d at 917-19.

[45] This is true even of many successful minority broadcasters. *See Cook Inlet Testimony* at 9-10.

start in a single local market, if successful they frequently expand into other communities as opportunity permits. Certain advantages do accrue to local residents in the comparative hearing process, but there are no comparable barriers to the purchase of a station in another market. Judge Silberman's belief that each station constitutes a unique opportunity is inconsistent with industry experience.

Judge Silberman's analysis, moreover, is at odds with this Court's own precedent, which draws a crucial distinction between termination of a present benefit and denial of a potential one not yet acquired, where the individual has far less of an investment at stake. "Denial of a future employment opportunity is not as intrusive as loss of an existing job," as "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-83 (opinion of Powell, J.). *Fullilove* recognized that a "sharing of the burden" by all innocent parties who might bid for federal contracts was acceptable, in upholding Congress's minority business enterprise set-aside, 448 U.S. at 484 (opinion of Burger, C.J.), 514-15 (opinion of Powell, J.); *see also Wygant*, 476 U.S. at 280-81 (opinion of Powell, J.). And it is hard to see how the burden here, diffused among all individuals who might choose to enter broadcasting and precluding no one absolutely from acquiring a station, either through purchase or in a comparative hearing, is any greater. Judge Silberman's analysis, by assuming *a priori* that each station is unique, would create an insuperable barrier to any race-conscious program to encourage minority broadcast ownership.

C. *The Minority Preferences Here Are Not Overinclusive*

Because the minority preferences in broadcast ownership operate on a nationwide basis, they are clearly not overinclusive in extending their benefits to all racial minority groups that have suffered from societal discrimination, unlike the municipal set-aside program held un-

constitutional in *Croson*. 109 S. Ct. at 727-28. Regardless of the locale in which minorities seek to acquire broadcast stations, they must labor under the same financial disadvantages that are the present-day consequences of past societal discrimination. Moreover, those who wish to enter what is, after all, a nationwide industry cannot realistically hope to succeed by confining their efforts to particular geographic markets.[46]

D. *The Comparative Minority Preferences Are Administered in a Careful and Flexible Manner*

This Court's decisions indicate that race-conscious programs are more likely to be upheld where they are carefully administered so as to avoid misapplications and ensure that the legitimate underlying objectives are accomplished. *Fullilove*, 448 U.S. at 487-88 (opinion of Burger, C.J.). The minority preferences in comparative hearings are subject to "administrative scrutiny to identify and eliminate from participation" spurious minority-front applicants and others who are not *bona fide*, as in *Fullilove*, 448 U.S. at 487-88.[47] The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham minority applicants and frequently disqualifies such applicants or denies them credit for integration of ownership and management, thereby also eliminating the value

[46] Significantly, the minority business enterprise set-aside program in *Fullilove* defined eligible minorities as broadly as Congress and the FCC have done here, 448 U.S. at 454, yet it was sustained against facial overinclusiveness claims. *Id.* at 486-89 (opinion of Burger, C.J.).

[47] The FCC also entertains challenges to the *bona fide* nature of participants in distress sales, as evidenced by Shurberg's own unsuccessful attack on Astroline. *See* 876 F.2d at 906. Indeed, the FCC has made clear that wherever limited partnership structure are used by applicants claiming the benefits of the tax certificate or distress sale policies, "in order to avoid 'sham' arrangements, we will continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)." *1982 Policy Statement*, 92 F.C.C.2d at 855.

of any minority preference.[48] Thus, Metro Broadcasting's complaints about the use of limited partnerships or other mechanisms by minority applicants need give rise to no fear of abuses.[49]

Minority enhancements in the comparative hearing process, while undoubtedly significant, clearly do not operate to deny whites any real chance of prevailing, as Metro Broadcasting's own statistics indicate.[50] The

[48] Numerous FCC decisions hold that the validity of an applicant's ownership structure can be tested as part of the comparative process, without any *prima facie* showing of bad faith by a competing applicant, in order to determine whether any nominally passive investors have in fact improperly played an active role in the applicant's creation or operations. *KIST Corp.*, 99 F.C.C.2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 F.C.C.2d 288 (1985), *aff'd sub nom. United Am. Telecasters v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986). *See also Hispanic Owners, Inc.*, 99 F.C.C.2d 1180 (Rev. Bd. 1985); *Berryville Broadcasting Co.*, 70 F.C.C.2d 1, 7 (Rev. Bd. 1978); *Henderson Broadcasting Co.*, 63 F.C.C.2d 419 (Rev. Bd. 1977). In *KIST*, the FCC's leading precedent on "sham" applications, both the Review Board and the Commission found that an applicant supposedly 95% owned by a black woman, and 5% by a white man, was unworthy of any credit for integration of ownership and management—and thus unqualified for any minority preference as well—in large part based on the nominal minority owner's lack of financial commitment. 95 F.C.C.2d at 186-87; 102 F.C.C.2d at 292-93 & n.11. *See also Northampton Media Assoc.*, 3 FCC Rcd. 5164 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948 (Rev. Bd. 1988); *Susan S. Mulkey*, 3 FCC Rcd. 590 (Rev. Bd. 1988); *Newton Television Limited*, 3 FCC Rcd. 553 (Rev. Bd. 1988); *Magdeline Gunden Partnership*, 3 FCC Rcd. 488 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 2 FCC Rcd. 6124 (Rev. Bd. 1987); *Pacific Television, Ltd.*, 2 FCC Rcd. 1101 (Rev. Bd. 1987); *Payne Communications, Inc.*, 1 FCC Rcd. 1052 (Rev. Bd. 1986).

[49] Brief for Petitioner Metro Broadcasting, Inc. at 22.

[50] Metro Broadcasting's own tally of cases decided between 1987 and 1990 demonstrates that white males prevailed in comparative hearings in 26 out of 79 (incorrectly stated as 78) instances, while white females prevailed in 11 instances. Minorities (including minority females) prevailed in only 42 of the 79 cases, little more than half. Brief for Petitioner Metro Broadcasting, Inc. at 23-25 & n.59.

[Continued]

FCC's comparative enhancement for minorities cannot be regarded as a set-aside or quota. In the first place, it plays no role at all unless no other party has a clear advantage in the quantitative percentage of integration of prospective station owners into management—an advantage that can be attained with a difference of as little as 12.5%,[51] and is frequently decisive. Moreover, even where there is no clear difference among the competing parties in quantitative integration, minority ownership is only one factor among the several "qualitative" enhancement factors weighed by the FCC to determine which applicant will provide the "best practicable service." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-99.[52] For example, local residence,

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[50] [Continued]

This enumeration in fact greatly overstates Metro Broadcasting's argument, since it does not reveal, in the cases where minorities prevailed, that they frequently did so not on the basis of the minority enhancement but on other non-racial factors such as a clear quantitative advantage in integration of ownership into management, demerits assigned to rivals for other media interests, comparative coverage, environmental impact, or the disqualification of rivals prior to any comparative evaluation. In fact, half of the cases cited by Metro Broadcasting where minorities prevailed (21 out of 42) were decided on factors other than the qualitative enhancements. Of the remaining 21 cases that were decided for minorities on the qualitative factors, in only *three* was minority and/or female status responsible for the result, while in another eight minority and/or female status helped to tip the balance in the applicant's favor together with other factors. Thus, minority and gender preferences can only be said to have influenced the award of a license to a minority applicant in about 14% of the FCC's recent comparative proceedings.

[51] *New Continental Broadcasting Co.*, 88 F.C.C.2d 830, 850 (Rev. Bd. 1981), *remanded on other grounds*, 93 F.C.C.2d 1275 (1983).

[52] Galaxy Communications is incorrect in suggesting that the FCC's process is flawed because race and ethnicity are the only factors the FCC considers in the diversity analysis. Brief of Galaxy Communications, Inc. as Amicus Curiae in Support of Petitioner at 8. All of the general qualitative enhancements—minority (and female) status, local residence, prior status as a daytime AM station

[Continued]

in the FCC's recent case law, is considered of equal strength to minority ownership,[53] so that a local resident with an additional enhancement for civic participation or past broadcast experience can well tip the balance in his favor against a nonresident minority. Thus, the comparative enhancement is quite similar to the consideration of race as one element in achieving a diverse student body that Justice Powell found permissible in *Bakke*, 438 U.S. at 314-19 (opinion of Powell, J.), as the D.C. Circuit concluded in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 613-16 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

Because the FCC's comparative process does not partake of the rigidity of a set-aside or quota system, there is no comparable need for an administrative waiver process, as in *Fullilove*. *See* 448 U.S. at 487 (opinion of Burger, C.J.); *see also Croson*, 109 S. Ct. at 728-29. The FCC has no constitutional obligation to consider whether particular minority owners will contribute to diversity of minority viewpoints in each individual case—or whether particular nonminority owners could also make some contribution to informing the public of minority concerns. Imposing such a requirement, in all likelihood, would confront the FCC with a bidding war of "minority-targeted" programming and "minority-favorable" political beliefs highly questionable under the First Amendment. Because the direct policing of viewpoints raises

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[52] [Continued]

owner, civic participation, and past broadcast experience—are considered and weighed at the same time in the comparative process, after it has been determined that there is no clear difference in quantitative integration of ownership and management among competing applicants, as all of these factors are thought relevant to the licensee's ability to provide the "best practicable service" under the public interest criterion. All of these factors reflect to some extent the diverse backgrounds that owners may bring to their new stations.

[53] *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 945-46 (1985); *Linda Crook*, 3 FCC Rcd. 354 (1988).

serious First Amendment problems, "it is upon ownership that public policy places primary reliance with respect to diversification of content," and ownership "historically has proven to be significantly influential with respect to editorial comment and the presentation of news." [54]

CONCLUSION

For the reasons stated, the minority preference policies implemented by the Federal Communications Commission should be held to be constitutional, and the decision of the court of appeals herein should be affirmed.

Respectfully submitted,

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[54] *TV 9*, 495 F.2d at 938.

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QUESTION PRESENTED

Whether the Federal Communications Commission's Congressionally mandated policy of considering minority status as one of several enhancing factors in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

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No. 89-453

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

METRO BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. For many years attorneys of the Legal Defense Fund have represented parties in litigation

before this Court and the lower courts involving a variety of race discrimination and remedial issues, including questions involving the proper scope and interpretation of the Fourteenth and Fifth Amendments. The Legal Defense Fund believes that its experience in this area of litigation and the research it has done will assist the Court in this case. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The FCC's minority ownership policies are a constitutional remedy to societal and industry related discrimination that has led to an absence of significant minority perspective in the broadcast media. The historic relationship between Congress and

the FCC make it clear, that these policies could not have been considered, instituted or maintained without the encouragement and insistence of Congress.

The Congressionally mandated minority ownership policies now under review, do nothing more than apply the principle that has been the hallmark of FCC regulation for six decades: that diversity of ownership leads to diversity of perspective. This principle embodies the FCC's attempt to promote First Amendment values without government regulation of or supervision over speech. Thus the minority ownership policies are consistent with Congressional and FCC policy of promoting vigorous public debate - not by imposing content restrictions on broadcasters - but by permitting different voices to be heard.

Over the years, every governmental body that has examined the issue, from the

Kerner Commission, to the FCC, to Congress, to the courts themselves, have found that the perspective of minorities has been absent from the media, and that the solution to this dilemma was to increase minority participation and ownership. The history and development of African American participation in the media, print and broadcast, demonstrates that media owned by African Americans brings a distinctive perspective to the qualitative judgments involved in presenting news and entertainment.

ARGUMENT

I.

HISTORICALLY CONGRESS HAS IMPOSED ITS WILL ON THE FCC THROUGH A VARIETY OF FORMAL AND INFORMAL MEANS

The assertion that "Congress acts only by enacting legislation"[1] completely ignores the reality of the six decades of interaction between Congress and FCC That is, despite its broad regulatory independence, Congress has, since the creation of the Commission, actively sought to constrain the FCC from exceeding the

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[1] Brief For The United States As Amicus Curiae Supporting Petitioner, Metro Broadcasting, Inc. v. Federal Communications Commission, et al., No. 89-453, p. 15. The Solicitor General apparently uses this reference to infer that the appropriations riders which Congress passed to prevent the reevaluation of the minority enhancement programs should not be considered as legislation, or as an expression of Congressional intent.

bounds of its statutory mandate.[2] First, the statutory limit on the tenure of commissioners, and the requirement that the Senate confirm all appointments to the Commission are built in sources of Congressional control.[3] In addition, Congress has repeatedly used such techniques as Congressional investigations, control over FCC appropriations, moratoria, and standing committee oversight, as well as substantive legislation, and the threat

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[2] Newton Minow, former Chairman of the F.C.C., recounts the following encounter with Speaker of the House Sam Rayburn shortly after being appointed Chairman. According to Mr. Minow, Speaker Rayburn embraced him and said: "Just remember one thing son. Your agency is an arm of the Congress. You belong to us. Remember that, and you'll be all right." The Speaker went on to warn Minow to expect pressure, but Minow recalls, "what he did not tell me was that most of the pressure would come from the Congress itself". Minow, Book Review, 68 Colum. L. Rev., 383, 383-4 (1968).

[3] 47 U.S.C. 154(c) (1982)

of legislation to assert its authority over the Commission.

Communications regulation began in this country with the Radio Act of 1927,[4] which contained the general public interest standard and delegated broad authority to the Radio Commission. Congressional distrust of this authority burgeoned almost immediately, however, and the Communications Act of 1934 repealed the Radio Act and transferred its grant of power to the Federal Communications Commission. In the ensuing six decades, Congress has enacted "relatively little" legislation regulating broadcast

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[4] Pub. L. No. 632, 44 Stat 1162 (1927). Earlier efforts at regulation have been described as completely ineffective. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 375-77 (1969).

programming.[5] Thus statutory control, the most obvious congressional activity, "is noteworthy for its relative unimportance in broadcast regulation".[6]

Despite the relative dearth of substantive legislation restricting or extending the FCC's broad mandate of authority, Congress has maintained a close watch over Commission activity and has had a tremendous amount of influence in the formulation and direction of FCC rules and regulations.

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[5] T. Dyk and R. Goldberg, "The First Amendment and Congressional Investigation of Broadcast Programming", 3 JLPOL 625, 628 (1987).

[6] Krasnow and Shooshan, "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission", 10 Harvard J. On Legis. 297, 301 (1973).(Hereafter cited as Krasnow and Shooshan.

The FCC's status as an independent agency amplifies its dependence on Congress. That is, independent agencies:

> are not part of any executive department, they must function without the political protection of the President or cabinet officer. They also lack any effective means of appealing for popular support. As a result, members of Congress have little fear of political reprisal when interacting with these defenseless agencies.[7]

In fact, the lack of substantive legislative guidelines for the FCC makes it all the more vulnerable to other forms of congressional influence.[8] According to Paul E. Comstock, a former vice president and general counsel for the National Association of Broadcasters, "[m]ost of our

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[7] Shooshan and Kransnow, "Congress and the Federal Communications Commission: The Continuing Contest for Power", 9 Comment 619 (1986-7),(Hereafter cited as Shooshan and Kransnow.

[8] Krasnow and Shooshan, supra at 305.

work is done with congressional committees. We concentrate on Congress. We firmly believe that the FCC will do whatever Congress tells it to do, and will not do anything Congress tells it not to do."[9]

From its inception, and for the first three decades of its existence, the FCC was almost always under Congressional investigation or the threat of one. Indeed, "probably no other federal agency has been the object of as much prolonged investigation by Congress as the FCC"[10] Er fifteen years prior to the adoption of "network regulations", Congress pressured the FCC, and before that the Radio

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[9] Thorp, "Washington Pressures", 2 National J. 1807, 1809 (1970).

[10] W. Emery, "Broadcasting And Government", 310, 396 (1971). See also, T. Dyk and R. Goldberg, The First Amendment and Congressional Investigation of Broadcast Programming, 3 JLPOL 625, 626-7 (1987).

Commission, on the issue of whether, and how, to regulate the growth of radio networks. During that period, "in virtually every session of Congress, the evils of monopoly in the broadcasting industry were oratorically deplored, and the FCC was frequently chided for not riding herd on network practices."[11]

In 1943, the House passed a resolution setting up a select committee to scrutinize the organization, personnel and activities of the FCC[12] And, in 1971, the House held hearings to investigate the problem of "staged" news and documentaries on television.[13]

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[11] Id.

[12] H.R. Res. 21, 78th Cong., 1st Sess., 89 Cong. Rec. 26, 235 (1943).

[13] Hearings Before the Special Investigation Subcommittee of the House Interstate and Foreign Commerce Committee, 92nd Cong., 1st Sess. (1971).

> By helping to keep the FCC responsive and attuned to the wishes and expectations of segments of the public, as expressed through Congress, they illustrated just how effective properly conducted investigations could be in achieving some of the goals of Congressional oversight.[14]

As the pace of deregulation accelerated during the Reagan years, Congress began to respond specifically to attacks on various FCC rules. In a rider to the Budget Reconciliation Act of 1981, Congress revoked the FCC's permanent authorization and placed it on a two-year authorization, in keeping with its treatment of other executive agencies during this period.[15] This allowed Congress

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[14] Krasnow and Shooshan, supra at 313.

[15] House Budget Committee, 95th Cong., 1st Sess., Congressional Control of the Budget 19, 22-4 (Committee Print 1977). At the end of World War II, 95% of the federal budget was under permanent authorization. In the 1970's, Congress

to amend the Communications Act every two years. The new authorization also allows Congress to influence FCC policy in less formal ways.[16] The Conference Report reasoned that

> regular and systematic oversight will increase the Commission's accountability for the implementation of Congressional policy. . . . The Commission, in turn, will have a better appreciation of Congressional intent.

H.R. Cong. Rep. No. 208, 97th Cong., 1st Sess. 899 (1981).

Though less formal methods of Congressional influence can work tremendous reversals at the FCC, Congress has used the appropriations process both often and

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shifted an increasing number of agencies to annual or multi-year authorizations. Approximately one half of the budget remains under permanent authorization.

[16] Krasnow and Shooshan, supra 303.

creatively in its ongoing effort to control the activities of the Commission.

Each house of Congress has promulgated internal rules limiting the use of appropriations riders to enact substantive legislation[17]. Nevertheless, Congress has frequently used appropriations riders to enforce its will on the Commission. This has become even more evident since the FCC was placed on two-year authorization in 1981.[18]

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[17] House Rule XXI(2), reprinted in Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 279, 99th Cong., 2d Sess. 573 (1987); Senate Rule IV(4), reprinted in Standing Rules of the Senate, Sen. Doc. No. 4, 100th Cong., 1st Sess. 10-12 (1987). These rules are not constitutionally compelled, and are frequently waived.

[18] Congress has absolute discretion not only over the amount of money allocated to the Commission but also over the purposes for which such funds are to be used. Subcommittees of both houses' Appropriations Committees hold annual hearings to examine the F.C.C.'s budget requests and to question the commissioners

Appropriations riders come in two forms: positive and negative. Congress uses both to control the FCC. Positive riders require some action on the part of the Commission; such as the 1987 rider requiring the FCC to consider alternative means of enforcing the Fairness Doctrine and to report it findings to Congress.[19] Negative riders, known as limitation

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and top-level staff. Many opportunities exist, both at these hearings and elsewhere, for the subcommittees to "scrutinize FCC behavior and to communicate legislative desires to the officials involved . . . Although the reports are not law, the Appropriations Committees expect that they will be regarded almost as seriously as if they were". R. Fenno, The Power of the Purse, (1966), see generally and at 18.

[19] The 1987 continuing resolution stated that "funds appropriated to the Federal Communications Commission by this Act shall be used to consider alternative means of administration and enforcement of the Fairness Doctrine and to report to the Congress by September 30, 1987. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, Section 101(b), 100 Stat. 3341, 3341-67 (1986).

riders, restrict the Commission's ability to spend funds or to rescind or modify an existing policy. This is the type of rider used in 1988 to prohibit the FCC from reexamining its minority and female preference policies, which Congress has extended through fiscal years 1989 and 1990.[20] Appropriations riders sometimes express legislative intent concerning the policy or practice at issue. For example, in the minority preference limitation rider the Senate Appropriations Committee explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and

[20] Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987); Pub. L.No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989).

> improved service to minority . . . audiences.[21]

The appropriations riders at issue in this case prohibit the FCC from spending money to rescind a policy that had been in effect for over ten years and had been addressed by Congress in the past only positively. The only feasible intent behind the riders, amply supported by the legislative history and the earlier legislation that prodded the FCC to develop minority preferences in the first place, is that Congress supported the preferences as they had been crafted by the FCC.[22]

In 1983, Congress used a negative rider to block the FCC's liberalization of

[21] S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

[22] See Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc., No. 89-700, Brief for F.C.C. at 22-28.

its television group ownership rules.[23] This forced the FCC to reconsider, hold hearings, and eventually modify the rule to Congress' liking.[24] An appropriations rider in the 1988 Act "prohibited the FCC from modifying its rules limiting newspaper-television cross-ownership and from extending any existing waivers from those limits."[25] In the Commission's 1989 appropriations package, Congress directed the agency to promulgate regulations before January 31, 1989, aimed at enforcing the

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[23] Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat. 1467 (codified at 47 U.S.C. 156).

[24] Amendment of Section 73.3555, Memorandum Opinion and Order, 100 F.C.C. 2d 74, para. 3 (1985).

[25] H.R. Res. No. 395, 100th Cong., 1st Sess., 133 Cong. Rec. H12, 805, 14 (daily ed. Dec. 22,1987).

restrictions on broadcast indecency in 18 U.S.C. 1464 on a 24-hour a day basis.[26]

Occasionally Appropriations Committees have worked their will without legislation of any kind. In 1974, a well-publicized struggle between the FCC and Congress raged over the issue of sex and violence in television programming. During the 1960's and early 1970's, Congress had held a number of hearings about such programming. Finally, frustrated with what it perceived to be inadequate Commission attention to the problem, the House Appropriations Committee issued a report that, in strong language, gave the Commission a deadline for submission of a report outlining its proposals.[27] The report warned that while

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[26] Pub. L. 100-459; 53 Fed Reg. 52425 (Dec. 28, 1988). The regulations are found at 47 C.F.R. 73 (1989).

[27] H.R. Rep. No. 1139, 93rd Cong., 2d Sess. 15 (1974).

> [T]he Committee is reluctant to take punitive action to require the Commission to heed the views of the Congress, and to carry out its responsibilities ... if this is what is required to achieve the desired objectives, such action may be considered.[28]

The Senate appropriations Committee issued a similar report.[29] Eventually broadcasters, with FCC encouragement and promotion, adopted the "family viewing hour."[30]

A similar process led the FCC to expedite the processing of applications for low-power television stations in 1983.[31]

Another means of Congressional oversight and control of the Commission is

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[28] Id.

[29] S.Rep. No. 1056, 93rd Cong., 2d Sess. 19 (1974).

[30] Shooshan and Krasnow, supra at 627, 636.

[31] S. Rep. 206, 98th Cong., 1st Sess. 23 (1983).

the use of moratoria. Moratoria are conceptually similar to negative appropriations riders. However, rather than prohibiting the expenditure of funds, they merely disallow the agency from implementing a certain rule or decision for a given period of time. Though a moratorium and an accompanying report may convey Congressional views on an issue, its usual purpose is to give Congress time to review the issue. Thus a moratorium is usually used at one stage in an ongoing process of Congressional influence.

Congress first imposed a moratorium on the FCC in the 98th Congress, amidst the syndication and financial interest controversy.[32] The same Congress imposed a six-month moratorium to prevent the FCC

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[32] Shooshan and Krasnow, supra at 621.

from repealing the political attack and editorializing rules.[33]

Occasionally, however, a moratorium will be the only thing necessary to effect the desired FCC response. For instance, Congress in 1984 strongly opposed the FCC's efforts to modify and eventually eliminate its restrictions on group ownership of media interest. Shortly after the Commission announced its final decision to replace the rule with a more lenient version that would sunset in five years,[34] Congress imposed a moratorium on the agency's implementation of the revision.[35] During the moratorium, the FCC suspended

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[33] H.R. 2250 98th Cong., 1st Sess., 129 Cong. Rec. H9308-11 (daily ed. Nov. 8, 1983).

[34] Report and Order, 49 Fed. Reg. 31,877 (1984).

[35] Pub. L. No. 98-396, Section 304, 98 Stat. 1369, 1423 (1984).

its "final order", considered the legislators' views, and ultimately decided upon a rule similar to the lenient one previously announced but with a few additional features and without the automatic sunset provision.[36]

Similarly, the oversight of various standing committees of congress has forged a longstanding relationship which adds to the expertise gained by Congress in considering issues that come before the Commission. Since 1946, for example, the Commerce Committee of each house has been authorized to "make continuing studies of the problems in the communications industry."[37] Each committee holds general oversight hearings at the beginning of each

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[36] Amendment of 73.3555, 100 F.C.C. 2d 74 (1985).

[37] Legislative Reorganization Act of 1946, Section 136, 2 U.S.C. 190d (1970).

session. Subcommittees of the commerce committees also hold hearings on specific topics.[38] A significant advantage of close committee oversight is that "members and staff of the congressional committee acquire some of the substantive knowledge

[38] In 1971-72, the House Subcommittee on Communications and Power held hearings on spectrum management, diversification of ownership, broadcast service to meet community needs, children's programming, the fairness doctrine, political broadcasting, cable television, domestic satellites, common carrier activities, and public broadcasting. Hearings on the Jurisdiction and Activities of the FCC Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, 92d Cong., 1st Sess. (1971). Six of seven commissioners and key staff members testified.

During these hearings, Chairman MacDonald recommended that the FCC establish a Children's television bureau to deal with programming and advertising aimed at young people. Four months later the Bureau was created. Speech by Dean Burch Before the International Radio and Television Society in New York, Sept. 13, 1971.

necessary to challenge the agency's handling of complex problems."[39]

These committees and their subcommittees have played active roles in effecting the informal controls so effectively used by Congress. More generally, in 1958 the House Legislative Oversight Subcommittee produced a "long and comprehensive study" of FCC policies and procedures.[40] The Commission adopted many of its suggestions, including: having an individual commissioner supervise the preparation of majority opinions, establishing a fee system, and charging

[39] Krasnow and Shooshan, supra at 317.

[40] Regulation of Broadcasting, Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action, 85th Cong. 2d Sess. on H. Res. 99, U.S. Government Printing Office, Washington, D.C., 1958, pp. 157-58.

broadcasters for special services and privileges.[41]

In the late 1950's and early 1960's Congress grew concerned with increased "trafficking" in broadcast licenses.[42] The 85th Congress authorized a Special Subcommittee on Legislative Oversight to hold extensive hearings on the issue.[43] Though the resulting bill died in the 86th Congress, a virtually identical bill was pending in the 87th Congress when the FCC adopted anti-trafficking rules.[44] As a result, ostensibly because these rules were and continued to be satisfactory to Congress, no trafficking legislation emerged out of committee after the rules

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[41] W. Emery, Broadcasting and Government, at 385 (1971).

[42] 60 Tex. L. Rev. 207, note 64.

[43] Id.

[44] 32 F.C.C. 689 (1962).

were adopted. That version of the rules was cited favorably in a report of the House Committee on Commerce.[45]

The number of committees that have assumed oversight responsibilities for the FCC has increased significantly. When the Communications Satellite Act of 1962 was under consideration, FCC Commissioners testified before nine different committees and subcommittees.[46] In the 92d Congress, the Senate Agriculture and Forestry Committee held hearings on a bill to create a rural telephone bank,[47] and the House Merchant Marine and Fisheries Committee considered the Vessel Bridge-to-Bridge Radiotelephone Act.[48]

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[45] H. Rep. 97-765.

[46] 28 Cong. Q. Almanac 551-55 (1963).

[47] Pub. L. No. 92-12, 85 Stat. 29 (1971).

[48] 33 U.S.C.A § 1201-08 (1971).

This strict oversight by Congressional Committees has made the FCC extremely sensitive to the intent and desires of Congress, and, conversely, allows Congress to remain abreast of problems, policies and procedures affecting the broadcast media. It follows that in determining the basis for Congressional action, the courts must look beyond the narrow proceedings that accompany a single piece of legislation, and consider the broad expertise and experience of Congress in legislating in a particular area over time.

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Fullilove v. Klutznick, 448 U.S. 448, 502-503 (1980).

II.

CONGRESS HAD SUFFICIENT EVIDENCE BEFORE IT TO CONCLUDE THAT ENHANCEMENT OF MINORITY OWNERSHIP COULD BE EXPECTED TO CONTRIBUTE TO THE DIVERSITY OF PERSPECTIVE AVAILABLE

The Solicitor General[49] and Judge Williams in the dissent in below, fault Congress for failing to review sufficient evidence to draw a conclusion that has never been disputed, and that, in fact, has been the hallmark of FCC policy for 54 years: that the principle means of ensuring a diversity of programming is through a

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[49] Brief For The United States As Amicus Curiae Supporting Petitioner, Metro Broadcasting, Inc. v. Federal Communications Commission, et al., No. 89-453.

diversity of ownership.[50] Created by Congress by the Commissions Act of 1934, the FCC exercises broad authority to regulate the broadcast media for the convenience and in the interest of the public. 47 U.S.C. § 303. Multiple ownership rules, whereby the Commission enforces limits on the number of radio and television station licenses any person may hold, date back to the 1940's. The current limit is 12 licenses in each service (AM, FM or TV), and no person may hold licenses for television stations serving more than

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[50] In the 1940's the F.C.C. sought through pro-competitive regulations called chain broadcasting rules to limit the power of the national networks, to prevent possible future media concentrations, and to promote autonomy of licensees. See F.C.C. Report on Chain Broadcasting (1941). These regulations were upheld by the Supreme Court in NBC v. United States, 319 U.S. 190, 224, 226-227 (1943).

25% of the television households nationwide.[51]

In 1953, the Commission stressed that its rules limiting multiple ownership of broadcasting facilities, were designed to promote diversity of ownership in order to maximize diversity of ideas, information and program service.

> [T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest.

Rules and Regulations Relating to Multiple Ownership of Standard, FM and Television

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[51] Minority owners, however, are permitted 14 stations per service and up to 30% of the national TV market. 47 C.F.R. § 73.3555 (1987): Amendment of Section 73.3555 of the Commission's Rules, 100 F.C.C. 17 (1984).

Broadcast Stations, 18 F.C.C. 288, 291 (1953).[52]

In 1965, the Commission released its Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 5 R.R. 2d 1901, (1965) asserting that "the first amendment . . . 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public'". Id. at 394 n.4 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1944)).

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[52] The Commission has also promulgated regulations restricting the cross-ownership of television and either cable systems or newspapers serving the same areas or markets. See 47 C.F.R. § 76.501 (1987); 47 C.F.R. § 73.3555(c) (1987). Here the Commission concluded that these regulations advanced the public interest by promoting dissemination of information from diverse viewpoints. The Supreme Court upheld these regulations in F.C.C. v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

The Commission identified six criteria that should be considered in comparative hearings, including: diversification of control - the aim of which is to prevent concentration of ownership control in the media;[53] and, full-time participation in operation by owners - here the Commission found that an owner's full-time participation promotes sensitivity to community needs, fosters better public service, furthers the goal of broadcasting diverse information, and reduces the possibility of ownership of multiple stations.[54] The Commission noted that its

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[53] An applicant with fewer pre-existing ownership interests in other mass media is preferred and gets merit in the comparative hearing process. 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395-395 (1965).

[54] Preferences for minorities are subsumed under this category, and thus "the relevant consideration is not minority ownership per se but the extent to which minority owners are integrated into the

basic policy objectives were to provide the best service to the public by promoting the greatest possible diversity of information and to ensure the maximum diffusion of control of the broadcast industry.[55]

Noting its belief that diversity of control of communications outlets is beneficial to a free society and is essential when the government limits access to the public use of television, the 1965 Policy Statement made clear that concentration of mass media ownership would have a deleterious effect on the

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proposed station's operation". New Continental Broadcasting Co., 88 F.C.C. 2d 830, 844 (Rev. Bd. 1981).

[55] 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 395-396 (1965).

communication of new and disparate ideas. Id. at 394.[56]

Congress intended for the public interest to underlie the issuance of broadcast licenses, Radio Station WOW v. Johnson, 326 U.S. 120, 131-132 (1945), which are to be awarded so as "to provide a fair, efficient, and equitable distribution of radio service". 47 U.S.C. § 307(b). In support of the wide latitude granted the Commission to make the "predictive judgments" necessary to determine what is in the public interest, this Court has held that the Commission need not come forward with an in-depth

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[56] Even in rejecting the "Fairness Doctrine" Syracuse Peace Council, 2 F.C.C. 2nd 5043 (1987), aff'd 867 F.2d 654, 658 (D.C. Cir. 1989), the Commission stated that "we do not question the interest of the . . . public in obtaining access to diverse . . . sources of information". Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143,147 (1985).

factual report supporting its conclusions, since "the possible benefits of competition do not lend themselves to detailed forecast." F.C.C. v. R.C.A. Communications, Inc., 346 U.S. 86, 96 (1953).

This Court has recognized on a number of occasions that diversity of ownership of the mass media, including radio and television stations, is likely to enhance the diversity of ideas and expression favored by the First Amendment, and is an important societal concern. See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1967).

In F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 780 (1978), for example, this Court endorsed the Commission's long-standing practice of acting on the theory that

"diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power". There, this Court held that it is appropriate for the Commission to consider First Amendment and antitrust values.

Congress, the Court of Appeals and the Commission have all found in one form or another that

> [I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.

TV 9 Inc. v. F.C.C., 495 F.2d 929, 937-938 (D.C. Cir. 1973). See Citizens Communications Center v. F.C.C., 447 F.2d 1201, 1213 n.36 (D.C.Cir. 1971); H.R. Rep. No. 765 at 40; S. Rep. No. 182 at 76;

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d at 394; 1978 Minority Policy Statement, 68 F.C.C 2d at 980-981 (Pet. App. 134a-137a)

In 1968, the Report of the National Advisory Commission on Civil Disorders (Kerner Commission) focused attention upon the relationship of minorities and the media, noting the stereotypical presentation of blacks on television, the dominance of the media by whites, and suggesting a nexus between this and racial unrest in the country.

> The media report and write from the standpoint of a white man's world. . . . Slights and indignities are part of the Negro's daily life, and many of them come from what he now calls "the white press" - a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America.

Id. 366.[57]

The FCC responded to this by instituting a series of antidiscrimination and equal employment opportunity initiatives, justifying its intervention based upon the requirement that broadcast licensees serve the entire public.

In 1968, the Commission proposed rules to address employment discrimination in the broadcast industry.[58] In 1969, the

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[57] It is noteworthy that in 1990, this continues to be a problem. See, Reed, 'Black Pathology' is a Big Business, The Philadelphia Inquirer, February 3, 1990 at 7-A (describing the overreporting and overpresentation of black pathology and the underreporting and underrepresentation of white pathology on television). See also, Window Dressing On the Set: Women and Minorities in Television, A Report of the United States Commission on Civil Rights, August 1977; Window Dressing On the Set: an Update, A Report of the United States Commission on Civil Rights, January 1979.

[58] Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, 13 F.C.C. 2d 766 (1968).

Commission required broadcasters to adopt equal opportunity programs.[59] And, in 1970, the Commission required broadcasters to file annual reports on their employment by racial categories.[60]

In 1970, the Court of Appeals for the District of Columbia[61] held that comparative hearings considering the effect on diversity of programing were necessary.

> Since one very significant aspect of the "public interest, convenience, and necessity" is the need for diverse and antagonistic sources of information, the Commission simply cannot make a valid public interest determination without considering the extent to which

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[59] Nondiscrimination in Broadcast Employment, 18 F.C.C. 2d 240 (1969).

[60] Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Employment Practices, 23 F.C.C. 2d 430 (1970).

[61] The District of Columbia Circuit is charged by the Act with original jurisdiction to hear appeals of FCC decisions, 47 U.S.C. § 402

> the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it.

Citizens Communications Center v. F.C.C., 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971)

III.

AFRICAN AMERICAN MEDIA DEMONSTRABLY PRESENTS A DIFFERENT PERSPECTIVE AND EMPHASIS THAN THAT PRESENTED BY THE MAJORITY MEDIA

The Congressional finding that diversity of ownership results in diversity of programming is amply illustrated by the experience of black media. Perhaps the best and longest running example can be found in the black press. Dating back to 1830, the black press' raison d'etre lay in what John Russwurm, co-publisher of the

first black newspaper, Freedom Journal, wrote in the first edition of the paper.[42]

> We wish to plead our own cause. Too long have others spoken for us. Too long has the public been deceived by misrepresentations in things which concern us dearly.

Today that difference is no less profound.

> The black press differs from the white (press) not so much in kind as in message. It reports news not covered by other journalism. It interprets that news differently, from an uncommon standpoint. It ventures opinions about matters not dealt with by other presses and its opinions frequently vary from those of

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[42] Freeman's Journal, (16 March 1827), reprinted in Martin E. Dann, The Black Press: 1827-1890 (New York: Putman & Sons, 1971), See also, Jeter, James Phillips, "A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned and Black-Oriented Stations, Ph.D. Dissertation, University of Wisconsin, 1981 p.34.(Hereafter cited as Jeter).

> other publications treating the same topics.[43]

During the past ten years there have been a number of academic studies examining the impact of minority ownership to see how it relates to service to minority communities. While these studies do not necessarily show a quantitative difference between white-owned and minority-owned stations in their commitment to news, public affairs and other non-entertainment programming,[44] they have found qualitative differences that reflect the diversity of

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[43] Roland E. Wolseley, The Black Press: U.S.A. (Ames, Iowa: Iowa State University Press, 1971), p.14.

[44] Jeter, supra at pp. 13[illegible] 142; Schement, Jorge Reina and Singleton, [illegible]oy A. "The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, Journal of Communication 31 (Spring 1981) 78-83.

content or perspective that the FCC policy is designed to foster.[65]

For example, when black-oriented radio stations licensed to white owners were compared to those licensed to black owners, black owners differentiated their product more than white owners, thus displaying more diversity of content with respect to

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[65] The Washington Post reported in 1973, that the influx of black owners would bring about a "new wave in content of black-oriented radio". The Post particularly noted the case of WSOK in Savannah, Georgia, which underwent a drastic change in its programming when the station changed from a White-Owned Black-Oriented Radio Station to a Black-Owned Black-Oriented Radio Station. Examining this development the Post quoted Theodore Ledbetter, a Washington, D.C. - based communications consultant, who said:

> Part of the new format being set up by black owners is less rigid programming. In the old days all you heard was James Brown and Wilson Pickett. This barred people like Nancy Wilson and almost all jazz artists.

Hollie West, "Black Radio: A Question of Ownership and Control," Washington Post, 29 January 1973, Sec. B. p. 5, Col. 2-3

their entertainment programming.[66] A related study focusing more particularly on qualitative issues found that a black-owned television station featured content that accurately reflected the owner's goals regarding specialized service to the black community.

> Specifically, ownership and management wanted more news about education, employment, international affairs with emphasis on black nations, and more community events and "people in the news" items. BCN [Big City News, the half-hour, daily, local newscast, broadcast by WGPR a black-owned UHF independent station serving the Detroit market] wanted to de-emphasize crime as news while emphasizing positive aspects of black Detroit through its "people in the news" and community events coverage. BCN wanted to emphasize coverage of the city of Detroit, and not the suburbs, and to report often on "racially significant" aspects of the news. The ownership and management also wanted to show a high number of blacks in the news as a vehicle to help make WGPR

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[66] Jeter, supra at pp. 136-142.

> part of the black community and to involve the community in the station. This was also seen as a way to raise viewer consciousness about the role of black Americans in city, state, national, and even international events.[67]

Another study analyzed four minority owned stations serving different populations with different philosophies of ownership obligations to the minority communities they serve and/or spring from.[68] This study analyzed the programming content of Hispanic-owned and Hispanic-oriented KORO-TV in Corpus Christi, Texas; Black-

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[67] Fife, Marilyn Diane, "The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content", Report to the National Association of Broadcasting, Office of Research and Planning, September, 1979 pp.44-45.

[68] Fife, Marilyn Diane, "The Impact of Minority Ownership on Minority Images in Local TV News", Presented at the 15th Annual Howard University Communications Conference, Washington, D.C., February 13-16, 1986.(Hereafter Fife, 1986)

owned and Black-oriented WGPR-TV in Detroit, Michigan; majority black-owned[69] but mainstream oriented WLBT-TV in Jackson, Mississippi; and black-owned WVII-TV in Bangor, Maine.

The study defines "narrowcasting" as arising where the minority ownership targets their own racial/ethnic community as a focus of service, and "mainstreaming" as where the minority ownership targets the general community in a manner common to commercial broadcast TV outlets, but imbues their service with a commitment to cultural pluralism rarely seen in majority-controlled TV outlets.

This study concluded that "narrowcasting" stations such as KORO and WGPR sought "to use a major form a mass

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[69] Sources vary on the precise percentage of black ownership, with statements ranging from 51% to 55%.

communication to validate and to showcase a minority culture" and "to create a broadcast institution that can function as a resource for a minority community at the local level".[70] Minority owned mainstreaming stations, such as WLBT were seen as attempting "to use a major form of mass communication to legitimize different components of the same community".

However, in the case of WVII, where neither narrowcasting or mainstreaming were possible because of the lack of a substantial minority community, the study nevertheless found that the minority owners showed a "special sensitivity to community needs and a willingness to take chances on non-traditional people in key positions".[71]

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[70] See Fife 1986, supra

[71] Id. at 26.

Percy Sutton, Chairman of Inner City Broadcasting, testifying before a Congressional Committee in 1989, gave as an example of the impact a black-owned radio station may have on politics and culture - even in the highly competitive media market of New York City - the victory of David Dinkins, an African American, in the Democratic primary for Mayor of New York City.

> In his acceptance speech- rather, the speech of thanks to his constituents, to the voters and others-he said, I want to thank Mr. Sutton and the WLIB family. Without the WLIB family permitting us to communicate, I could not possibly have won this Democratic primary. WLIB is a daytime radio station.
>
> It is the only daytime radio station in the City of New York. In evaluating where he would place the campaign manager, in evaluating where he would place his advertisements, his commercials, he found that to reach the black community . . . that he needed to reach, from which he came, the number one

> station to reach that community was WLIB, a daytime station.[72]

Significantly, the Congressional Research Service was quite clear as to the conclusion to be drawn from its analysis of the impact of black ownership on program content and perspective.

> [T]hese data indicate that certain conditions in ownership and in programming exist which suggest a positive relationship between minority broadcast station ownership and minority programming. That is, where minority ownership was found to exist among stations, that group of stations programmed

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[72] Hearing Before the Subcommittee on Communications of the Committee On Commerce, Science, and Transportation, United States Senate, 101st Congress, 1st Session on Minority Ownership of Broadcast Stations, September 15, 1989, p.24. See also at 25: "A recent poll conducted by New York Newsday by the Gallup Organization found that nearly 7 out of 10 Black New Yorkers surveyed said that they look to WLIB, its sister station WBLS (FM) and the City's leading Black weeklies as a source of news. Even more impressive, one quarter of those questioned said they rely on Black-owned radio and publications as their most important news source!"

> proportionately more to their own minority audiences as well as to other minority audiences than did those stations with no minority owners.[73]

Undergirding the fact of the recognition by Congress, the FCC and until now, the Court of Appeals, that diversity of ownership equals diversity of perspective, is the related recognition of the harm done by the exclusion of blacks from participation in the broadcast industry.

> Because blacks were not pleading their own cause, the content of the media became a voice <u>to</u> them rather than a voice <u>by</u> them. Because black people had no input into the ownership and decision-making function of hiring, program production, budgeting, promotion and scheduling; the result was a long line of situation comedies on television, "blaxploitation" films and "soul"

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[73] "Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?" at CRS-42.

radio stations which were nothing more than jukeboxes.[74]

IV.

CONGRESS HAS BROAD DISCRETION TO DETERMINE THE HARM DONE BY RACIAL DISCRIMINATION AND TO FORMULATE A REMEDY FOR THAT DISCRIMINATION

In City of Richmond v. J.A. Croson Co., 109 S.Ct 706 (1989), this Court held that racial preferences granted by state or local governments violate the Fourteenth Amendment's ban on governmental discrimination unless they are narrowly tailored to meet a compelling public interest. Thus while Croson marked the first time that a majority of the Court adopted strict scrutiny in the affirmative action context, it cannot be read as prohibiting Congress from taking race-

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[74] Jeter, supra at 10.

conscious action when it is necessary to meet a compelling public interest.

Indeed, even as applied to state and local governments, if the strict scrutiny components are met, then remedial race-conscience measures will be upheld. On the other hand, the Court in Croson acknowledged that the constitutional requirements are less stringent for the remedial race-conscience measures enacted by the federal government, than for those enacted by state and local governments.

Relying on and reaffirming Fullilove v. Klutznick, 448 U.S. 448 (1980), Justice O'Connor explicitly recognizes that Congress possesses "unique remedial powers" that enables it to use race-conscious

relief where states and cities cannot. Croson, 109 S.Ct. at 718.[75]

The distinctions that Croson acknowledged between federal and state power to use race-conscious measures means that even applying strict scrutiny, Congress retains significant discretion. It follows that the broader federal authority allows Congress to establish the factual predicate for its racial preferences without making findings of the same degree of precision and specificity as states and their subdivisions. Moreover, in analyzing whether a federal remedy is "narrowly tailored" to achieve a compelling

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[75] The Solicitor General concedes that the nature of the Congress demands that its determinations in this area be given greater deference then that accorded state and local bodies under Croson. However, notwithstanding that concession the Solicitor General so narrowly defines the scope of that deference so as to leave it a distinction without a difference. U.S. Brief, Metro at 12.

interest, the courts must similarly pay more deference to Congress' selection of the appropriate remedy then they would to the choices of state and local governments.

Examining the factual predicate of the plan at issue in Croson, this Court held that local government officials could only impose a race-conscious remedy if they had sufficient evidence of identified discrimination in a particular industry within their jurisdiction. Mere societal discrimination against minorities was held to be insufficient as a factual predicate.

Conversely, the Court reiterated the holding of Fullilove, that Congress "may identify and redress the effects of society-wide discrimination". Croson, 109 S.Ct. at 719. In Fullilove, the Court found it unnecessary for Congress to have had before it evidence of identified

instances of racial discrimination in the national construction industry.

Of course, this does not imply that Congress need make no findings whatsoever, or that it can simply take legislative notice of our nation's sordid history in race relations. However, in assessing the effects of societal discrimination in the broadcast industry, Congress must certainly be free to rely upon "information and expertise that Congress acquires in the consideration and enactment of earlier legislation", Fullilove, supra, 448 U.S. at 502-503, and the courts should pay due deference to that expertise.

Contrary to the arguments of the Solicitor General, Congressional remedies need not be so narrowly tailored as to be "victim specific".[76]

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[76] U.S.Brief, Metro at p.23.

> [I]t is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently "narrowly tailored," or "substantially related," to the correction of prior discrimination by the state actor.

Wygant v. Jackson Board of Education, 476 U.S. 267, 287 (O'Connor, J., concurring) (1986).

This Court has not limited its endorsement of sufficiently compelling justifications for racial classification to remedying the effects of identified present or past racial discrimination.

> a state interest in the promotion of racial diversity has been found sufficiently "compelling", at least in the context of higher education, to support the use of racial considerations in furthering that interest.

Wygant, supra, 476 U.S. at 286 (Citing Regents of University of California v. Bakke, 438 U.S. 265, --- (1978) (Powell, J.); NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976), (FCC regulations dealing with

employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups.") See also, Croson, 109 S.Ct. at 731 & n.2 (Stevens, J., concurring).

The principle predicate for all race-conscious measures is the awareness that past discrimination and exclusion has continuing effects which the society wishes to change. However, those effects are not limited to individual victims of discrimination, or to members of the community who share the economic deprivation and discrimination, directly and indirectly. Rather, the effects include the harm done to the society as a whole, which denies itself the full benefit

of the genius, labor and enthusiasm of a significant number of its citizens.

> Lack of minority representation among owners of broadcast stations, the Commission held, "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."[77]

The minority ownership policies seek to enhance diversity in perspective in the broadcast media: a First Amendment imperative that overlaps with the Commission's mandate to regulate the industry in the public interest, without directly regulating content.

This goal intersects with the Equal Protection values of the Fifth and

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[77] Brief For Federal Communications Commission, Astroline v. Shurberg, No. 89-700, at 7.

Fourteenth Amendments, in that prior discrimination, both societal and industry specific, has lead to a lack of minority perspective and participation in the broadcast media.

Applying its traditional approach of promoting broadcast diversity by insisting on diversity of ownership, the FCC has addressed the need of insuring diversity of perspective, by insisting that the perspective of minority populations be included in the broadcast spectrum.

The Commission's initial attempts to achieve this end via Equal Employment Opportunity regulations and ascertainment policies;[78] relaxation of minimum showings

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[78] 1978 Minority Policy Statement, 68 F.C.C. 2d at 981 (Pet. App. 1301-331); Random Selection/Lottery Systems, 88 F.C.C. 2d 476, 489 (1981).

of financial qualifications;[79] and, increasing the number of new broadcast stations available for initial licensing;[80] failed to achieve the desired goal of increased minority perspective and participation.

The minority enhancement and distress sale policies are an effort to obtain this goal utilizing the traditional method of FCC regulation, i.e., by looking to ownership, and encouraging minority

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[79] See FCC Minority Ownership Task Force, Minority Ownership in Broadcasting (1978) at 11-12; New Financial Qualifications for Aural Applicants, FCC 78-556 (Aug. 2, 1978); New Financial Qualifications Standard for Broadcast Television Applicants, FCC 79-299 (May 11, 1979)

[80] See e.g., Availability of FM Broadcast Assignments, 101 F.C.C. 2d 638 (1985), reconsid. granted in part and denied in part, 59 Radio Reg. 2d (P&F) 1221 (1986), aff'd, National Black Media Coalition v. F.C.C. 2d 277 1345 (1980).

ownership. These policies were based on the Commission's belief that

> "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . ." and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." Id. at 981 (Pet.App. 134a).[81]

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[81] Brief For Federal Communications Commission, Astroline v. Shurberg, No. 89-700, at 6 (citing 1978 Minority Policy Statement, 68 F.C.C. 2d at 981)(Pet.App. 134a, 133a).

CONCLUSION

For the above reasons the decision of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

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METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Communications Commission's congressionally mandated policy of considering minority race as one of several factors in comparative licensing hearings in order to promote the First Amendment interest in diversity of expression in broadcasting is consistent with the equal protection component of the Fifth Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the constitutionality of the Federal Communications Commission's congressionally mandated policy of considering minority race as one of several factors in comparative licensing proceedings. Both Congress and the Commission have determined that this minority enhancement program is necessary to advance the government's compelling First Amendment interest in promoting diversity of expression in broadcasting.

This case is important to the *amici* because state, county, and municipal governments have enacted race-conscious programs not only to remedy discrimination, but also to achieve other compelling goals. In our view, this Court's cases clearly recognize the validity of other compelling purposes; but this case threatens non-remedial programs because of petitioner's insistence that only a remedial purpose can justify a race-conscious program. Moreover, many of these programs, like the Commission's policy at issue here, are based on legislative findings concerning problems and determinations of their best solution. *Amici* believe that these legislative findings and determinations should be accorded deference, not second-guessed by the courts. Thus, the constitutional validity of critical state and local government programs may be affected by the standards established with respect to the power of Congress to act in this case. See *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 719 (1989).

Amici believe that the decision of the court of appeals is correct, and submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

A. Introduction.

Petitioner Metro Broadcasting, Inc., respondent Rainbow Broadcasting Company, and Winter Park Communications, Inc., which is not a party to this case, filed mutually exclusive applications with the Federal Communications Commission for use of a new UHF television channel in Orlando, Florida.[2] Petitioner contends that the Commission violated the equal protection component

[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk.

[2] The administrative proceedings leading to the award of the license to Rainbow are well described in the court of appeals' opinion. Pet. App. 2a-6a.

of the Fifth Amendment by awarding Rainbow credit in a comparative licensing hearing for its significant minority ownership.[3]

B. The Comparative Hearing Licensing Procedure.

If none of the parties who file mutually exclusive applications for a new channel is entitled to a preference under 47 U.S.C. § 307(b) for providing first or second service to a community,[4] or if more than one applicant could qualify for such a preference for serving the preferred community, the Commission conducts a comparative hearing at which it evaluates the applicants' relative qualifications. See, *e.g.*, *Buena Vista Telecasters*, 94 FCC 2d 625, 628 (Rev. Bd. 1983). At the hearing, the Commission considers both "quantitative factors," which focus on the integration of ownership into management, and "qualitative factors," which include minority ownership, local residence, civic participation, and prior broadcast experience. If one applicant has a clear quantitative advantage, it will receive the license so long as it is otherwise qualified and does not own other media interests. See, *e.g.*, *WHW Enterprises, Inc.*, 89 FCC 2d 799, 819 (Rev. Bd. 1982), rev. denied, 92 FCC 2d 1501 (1983), aff'd in part and rev'd in part on other grounds, 753 F.2d 1132 (D.C. Cir. 1985). The qualitative factors cannot outweigh a clear quantitative advantage. *Id.* at 817.

[3] Based on the Commission's determination that its gender preference would not affect the outcome of this case, the court of appeals correctly concluded that petitioner's challenge to the validity of that preference need not be reached. Pet. App. 10a n.5. In any event, this Court should not consider that issue in the absence of a decision by the court of appeals. See, *e.g.*, *Simmons v. West Haven Hous. Auth.*, 399 U.S. 510, 511 (1970) (per curiam); *Mattiello v. Connecticut*, 395 U.S. 209 (1969) (per curiam).

[4] A Section 307(b) preference normally entitles an applicant to the license without a comparative hearing. See *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135 (D.C. Cir. 1985).

C. History of the Commission's Minority Enhancement Program.

The Communications Act of 1934, 47 U.S.C. §§ 151-609, provides that the Commission shall grant a license to an applicant "if public convenience, interest, or necessity will be served thereby." See 47 U.S.C. § 307(a). Subsequent to the enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Congress's adoption of the *Report of the National Advisory Commission on Civil Disorders* (1968), the Commission focused attention on the low level of participation by minorities in the broadcast industry and its effect on diversity of expression.[5]

The Commission first attempted to facilitate expression of the viewpoints of racial minorities by attacking discriminatory employment practices. To this end, the Commission adopted regulations prohibiting broadcast licensees from discriminating against minorities in their hiring practices, including regulations requiring licensees to develop specific practices designed to guarantee equal opportunity in all aspects of station employment. See, *e.g.*, *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969).[6] This Court upheld those regulations, noting that they were "necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FCC*, 425 U.S. 662, 670 n.7 (1976).

[5] The Commission has repeatedly indicated that it is committed to ensuring diverse programming because it "is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) ("*1978 Policy Statement*"). See also *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) ("*1965 Policy Statement*").

[6] See also United States Commission on Civil Rights, *Window Dressing on the Set: an Update* (1979); United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354 (1975); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970).

In order to encourage program diversity and assist "television media in discharging their statutory responsibilities for service in the public interest," the Commission also developed standards for the "ascertainment of community problems and needs by commercial broadcast license applicants." *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418, 418 (1976); see also *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). This ascertainment program required each licensee to maintain in its public files a list of certain demographic aspects of its area, and to survey community leaders, particularly those representing the interests of racial and ethnic minorities and women. Licensees were then required to broadcast programming responsive to the interests indicated in the surveys.

Following a series of decisions by the United States Court of Appeals for the District of Columbia Circuit expressing that court's belief that ownership of broadcast facilities by minority licensees enhances diversity of programming,[7] the Commission reviewed the adequacy of its equal employment and ascertainment rules to achieve diversity of expression. The Commission concluded that:

> the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs

[7] See, *e.g.*, *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

> and interests of the minority community but also enriches and educates the non-minority audience. . . .
>
> Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

1978 Policy Statement, 68 FCC 2d at 981-82.

Based on these findings, the Commission adopted a variety of measures designed to enhance diversity of expression through diversity of ownership.[8] *1978 Policy Statement*, 68 FCC 2d at 982-83. Concerning the use of qualitative enhancements, the Commission stated that "minority ownership involvement should continue to be a significant factor in comparative evaluations of applicants for broadcast authorizations." *Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 FCC 2d 1591, 1595 (1978). See also FCC's Minority Ownership Task Force, *Report on Minority Ownership in Broadcasting* (1978).

D. Congress's Interest in Encouraging Minority Ownership of Broadcast Facilities.

Congress explicitly endorsed the Commission's use of race-conscious programs to increase diversity of expression when it enacted the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 ("1982

[8] In addition to the minority enhancement program at issue here, the Commission adopted the distress sale policy pending before the Court in *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (cert. granted, Jan. 8, 1990), and a policy of issuing tax certificates permitting deferral of capital gains tax on sales of licenses to parties with significant minority interests. See *1978 Policy Statement*, 68 FCC 2d at 983.

Amendments").[9] That Act authorized use of a random selection system to award licenses (47 U.S.C. § 309(i)(1)), but also specified that any such system must incorporate "significant preferences" for minorities. *Id.* at § 309 (i)(3)(A).

The legislative history concerning this provision shows that "[t]he intent of the Congress in requiring such significant preferences in the administration of a lottery was to increase the number of media outlets owned by such underrepresented persons or groups, thereby fostering diversity of ownership in the media of mass communications."[10] H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 2261, 2267. The House Conference Report further notes that "[t]he nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." *Id.* at 40, reprinted in 1982 U.S. Code Cong. & Admin. News at 2284. See generally Conf. Rep. on H.R. 3982, Omnibus Budget Reconciliation Act of 1981—Book 2, H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 896-98 (1981).

In 1983, Congress held hearings regarding minority participation in the media. See *Parity for Minorities in*

[9] In an attempt to increase minority ownership of broadcast stations, Congress had enacted similar legislation the previous year. See Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981). The Commission determined, however, that the legislation should not be implemented on the ground that the statute and the legislative history lacked specificity regarding the preferences that should be accorded to minorities in the lottery licensing scheme. *Random Selection/Lottery Systems*, 89 FCC 2d 257, 279 (1982).

[10] The legislative history also refers specifically to the *1965 Policy Statement*, and states that "[i]t is the firm intent of the Conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, reprinted in 1982 U.S. Code Cong. & Admin. News 2261, 2284.

the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 1, 3, 125, 135-36, 147-49, 159-67, 194-95 (1983); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 4, 7-8, 137-39, 161-62 (1983). The testimony presented in these hearings explored the issues of minority underrepresentation in the broadcast industry and its adverse effect on programming diversity. Then, in 1984 and 1986, Congress again heard testimony regarding the nexus between minority ownership and program diversity. See *Corporation for Public Broadcasting Authorization: Hearing on S. 2436 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 78-94 (1984); *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 1, 2, 51, 56-57, 89-90 (1986).

E. The Appropriations Acts.

In 1986, the Commission initiated a nonadjudicatory inquiry to explore the constitutionality of its minority preference policies. See *Notice of Inquiry on Racial, Ethnic or Gender Classifications (MM Docket No. 86-484)*, 1 FCC Rcd 1315, 1317-18 (1986), modified, 2 FCC Rcd 2377 (1987), closed, 3 FCC Rcd 766 (1988). Responding to the Commission's action, Congress included a provision in the Continuing Appropriations Act for Fiscal Year 1988 directing:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a re-examination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to

> expand minority and women ownership of broadcasting licenses . . . .

Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). The Senate Appropriations Committee Report concerning this provision states:

> The Committee believes the inquiry [into the constitutionality of the Commission's minority preference policies] is unwarranted. . . . The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership.

S. Rep. No. 182, 100th Cong., 1st Sess. 76-77 (1987) (citations omitted).

Congress has in each subsequent year likewise directed that the Commission continue its race-conscious policies designed to foster diversity of expression. Specifically, in the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Acts, 1989 and 1990, Congress again prohibited the Commission's use of federal funds to reexamine or repeal its policies regarding minority preferences. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989).

SUMMARY OF ARGUMENT

A. This Court would have to repudiate the premise of its holdings in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.), and *United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977), in order to adopt the contention of petitioner and its *amici* that remedying past discrimination

is the only purpose that can justify a racial classification. Here, Congress and the Commission have a compelling interest in furthering First Amendment values by promoting diversity of expression in broadcasting. This interest extends to ensuring that the viewpoints of racial minorities are not excluded from the public airwaves, to protect not only minority broadcasters and their minority audiences, but also nonminorities who otherwise would be deprived of the benefit of full public discourse.

B. After considering the investigations and actions taken by the Commission, and after conducting its own hearings over several years, Congress concluded—repeatedly and without ambiguity—that viewpoints of racial minorities were underrepresented in broadcasting and that increasing the number of minority broadcasters was a necessary means of promoting diversity of expression. Congress's decision to focus on racial diversity of ownership as a means to promote diversity of expression follows the Commission's practice in seeking other types of diversity, and is mandated by the First Amendment limitations on regulation of content. Congress's decision does not depend in any way on racial stereotyping and is entitled to appropriate deference.

C. The Commission's congressionally mandated policy of considering race as one factor in comparative licensing hearings alleviates the documented underrepresentation of minority viewpoints, without imposing an undue burden on nonminorities. It is carefully designed to respect both the sensitivity of classifications based on race and the important First Amendment values implicated by the regulation of broadcasting. As such, the policy is "narrowly tailored" to its purpose of encouraging diversity of expression.

ARGUMENT

THE MINORITY ENHANCEMENT PROGRAM IS CONSISTENT WITH THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

A. Governments May Use Racial Classifications Not Only To Remedy Past Discrimination But Also To Achieve Other Compelling Purposes.

1. *Introduction.*

This Court has previously held that governments may use race-sensitive measures not only to remedy past discrimination, but also to advance other compelling interests, particularly interests related to freedom of expression. A majority of this Court held in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that a public university may consider the race of applicants for admission in order to further its compelling interest in the exchange of diverse ideas in the academic context. *Id.* at 320 (opinion of Powell, J.). In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), Justice White, writing for a plurality of the Court, stated that in protecting the " 'effective exercise of the electoral franchise' " (*id.* at 159) by racial minorities as mandated by the Fifteenth Amendment, "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." *Id.* at 161.

Contrary to the arguments of petitioner and its *amici*, the recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), do not undermine this principle. *Wygant* found that a school board's goal of providing role models for minority children did not justify a policy granting preferential protection against layoffs to minority teachers. It is one of many cases in which this Court has expressed concern about the significant "burden that a preferential-layoffs scheme imposes on innocent parties" (476 U.S. at 282 (plurality

opinion); see also *Firefighters v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)), and does not suggest that goals other than remedying past discrimination cannot justify a racial classification that does not have such a severe impact on nonminorities.[11] In *Croson*, the only justification offered for the City's program was to remedy past discrimination, and the Court therefore had no occasion to address whether other compelling purposes may also justify race-conscious programs.[12]

To adopt the contentions of petitioner and its *amici*, the Court would have to repudiate its prior recognition that government may use race-conscious means to achieve compelling interests apart from remedying past discrimination. *Bakke* and *United Jewish Organizations* teach that where government controls the right to expression, by deciding who will have access to a forum critical to

[11] Indeed, Justice O'Connor's concurring opinion in *Wygant* explicitly acknowledges that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant*, 476 U.S. at 286. Justice O'Connor went on to observe that nothing in *Wygant* "necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Ibid.*

[12] Petitioner and its *amici* point to Justice O'Connor's statement in *Croson* that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 109 S. Ct. at 721. But Justice O'Connor cited for this proposition Justice Powell's opinion in *Bakke*, and particularly its discussion of the danger that preferential programs will stigmatize their beneficiaries. *Ibid.*, citing 438 U.S. at 298. In context, Justice O'Connor's statement is properly understood to express her view that all racial classifications are subject to the same searching scrutiny regardless of "the race of those benefited or burdened by a particular classification." 109 S. Ct. at 721. There is no reason to believe that Justice O'Connor implicitly abandoned in *Croson* the views that she so clearly expressed in *Wygant*. See n.11, *supra*.

public debate and political participation, the First Amendment creates a compelling interest in ensuring that the result of that allocation affords an opportunity for expression to diverse voices across a broad spectrum of society.[13] Here, as in those cases, the compelling First Amendment interest in diversity of expression justifies consideration of minority race.

2. *The First Amendment creates a compelling interest in diversity of expression in broadcasting.*

The First Amendment, that primary guarantee of self-determination provided by the Bill of Rights, "rests on the assumption that the widest possible dissemination of information *from diverse and antagonistic sources* is essential to the welfare of the public [and] is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (emphasis added). "It is designed and intended to . . . put[] the decision as to what views shall be voiced largely into the hands *of each of us*, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971) (emphasis added).

This Court has held that the First Amendment "provides powerful reasons" for governmental action to ensure that access to the means of speech is not concentrated in a few hands, but given to a broad spectrum of society.[14] *Associated Press*, 326 U.S. at 20. Where

[13] In contrast to this case, *Wygant* and *Croson* involved simply the allocation of economic benefits, where the only compelling governmental interest is to ensure that the *process* of allocation is free from the effects of present or past racial discrimination.

[14] As this Court has recognized, "[t]here is no room under our Constitution for a . . . view [of the First Amendment that] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949); see, *e.g.*, *Cohen v. California*, 403 U.S. 15, 25-27 (1971).

necessary, government must take action to prevent majority interests from suppressing minority access to public fora—whether that suppression takes the form of physical coercion (*Hague v. CIO*, 307 U.S. 496, 516 (1939)), or economic power. *Associated Press*, 326 U.S. at 20.

These First Amendment considerations require particular attention and action by government in the broadcasting context. Both Congress and this Court have long recognized that "broadcast frequencies constitute[] a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-13 (1943). Physical and technological constraints limit access to broadcasting frequencies so that government must not only regulate use of the airwaves, but also allocate access thereto. Of necessity, government must allow access to some and deny it to others. See *id.* at 215-16.

To an ever-increasing extent, use of the airwaves is critical to public and political discourse. Like other more traditional fora, the airwaves are "held in trust for the use of the public and . . . used for . . . communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515. As this Court observed in 1973, "[t]he electronic media have swiftly become a major factor in the dissemination of ideas and information." *CBS v. DNC*, 412 U.S. 94, 116 (1973). It is well understood and accepted that the broadcast media have a unique and critical impact on essential aspects of our democracy, including national elections and legislative and judicial processes. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *CBS v. DNC*, 412 U.S. at 129; see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978).

Acknowledging the special nature of the broadcast media, this Court has recognized "the legitimate claims of those unable without governmental assistance to gain access to [broadcast] frequencies for expression of their

views," and has upheld Congress's and the Commission's interpretation and administration of the Communications Act to ensure access for such groups. See *Red Lion*, 395 U.S. at 400-01. Likewise, in holding that broadcasters may refuse paid editorial advertising, this Court stated that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system . . . heavily weighted in favor of the financially affluent" or the politically dominant. *CBS v. DNC*, 412 U.S. at 123.

For these reasons, Congress and the Commission clearly have a compelling interest in promoting diversity of expression in broadcasting. That interest extends to ensuring that the viewpoints of racial minorities are not excluded from the public airwaves, to protect not only the rights of minority broadcasters and their minority audiences, but also nonminorities who otherwise would be deprived of the benefit of full public discourse.

B. The Legislative Determination That There Is A Nexus Between Diversity Of Ownership And Diversity Of Expression Is Entitled To Deference, Is Based On An Adequate Record, And Should Be Upheld.

1. *Congress ratified and required continuation of the Commission's minority preference policies.*

After mandating in the 1982 Amendments that any lottery system for according licenses include minority preferences, Congress conducted hearings in 1983, 1984, and 1986 at which it further explored the problem of minority underrepresentation in the broadcast industry and its adverse effect on programming diversity. These congressional investigations followed development of similar evidence by the Commission over several years. With this background of investigation and prior legislation, Congress concluded in the Appropriations Acts—just as it had in the 1982 Amendments—that increasing minority ownership would increase diversity of programming, and on that basis directed the Commission to continue its minority enhancement program in full force and effect.

This legislative determination after investigation is entitled to appropriate deference by this Court, and should be upheld.

2. *The Commission has historically used diversity of ownership—not content regulation—to encourage diversity of expression.*

Congress's decision to focus on diversity of ownership, rather than on regulation of content, follows the Commission's traditional means for achieving diversity of expression in broadcasting.[18] This approach is in large part mandated by this Court's explication of the restraints placed on government by the First Amendment. Since holding in *Red Lion* that the "fairness doctrine" is consistent with the First Amendment, the Court has rejected government efforts further to regulate *content* of speech to ensure the expression of diversity of views. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. DNC*, 412 U.S. 94 (1973). The Court has indicated that government action to achieve a diversity of speakers in the broadcasting context is best accomplished through licensing procedures. See *CBS v. DNC*, 412 U.S. at 111, 113 & n.10; *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-03 (1978).

The fundamental First Amendment principles underlying these decisions are especially strong in the context of speech by racial minorities. Requiring broadcasters to express what the government finds to be the viewpoint

[18] The Commission's ownership regulations have historically included, among others, prohibitions on ownership or control of more than one station in the same broadcast service in the same community, limitations on the number of stations in each service under the control of one person or entity, prohibitions on common ownership of both a VHF television station and a radio station in the same market, and prohibitions on common ownership of a daily newspaper and a radio or TV station in the same community. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 780-81 (1978). In addition to these cross-ownership rules, the Commission also gives preference to residents of the area to be served by the station.

of a minority disenfranchises both the regulated broadcasters and the minority community, for whom the right of political participation is uniquely important. See *United Jewish Organizations*, 430 U.S. at 158-62 (plurality opinion); *Beer v. United States*, 425 U.S. 130, 140-41 (1976). Moreover, the prospect of having the government determine whether or not given speech reflects the views of a minority is repugnant to the core First Amendment right to expression untrammeled by government.

3. *Congress's determination is entitled to deference.*

The Acting Solicitor General argues (U.S. Br. 25) that the considerable deference generally accorded congressional determinations is not due here because "Congress has never enacted a statute expressly directing or authorizing the Commission to prefer minorities in comparative license proceedings in order to increase programming diversity." This contention is meritless.

As explained above, Congress explicitly endorsed the Commission's policy of promoting diversity of expression by increasing the number of minority broadcasters when it required, by statute, that any lottery system for allocating licenses incorporate minority preferences. See 1982 Amendments. Thereafter, when the Commission began to reconsider its minority preference policies, Congress intervened and expressly prohibited the Commission from repealing, changing or even reexamining those policies. Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). This prohibition, which was also incorporated in subsequent Appropriations Acts, could not have mandated more clearly that the Commission continue the minority enhancement program. Moreover, the legislative history of the Appropriations Acts, as well as the extensive history of prior congressional activity in this area, establishes beyond dispute that Congress has exercised *its judgment*, and has ratified the Commission's policies designed to increase programming diversity.[19]

[19] Judge Williams' characterization of this congressional action as a "kind of mental standstill" (Pet. App. 35a (Williams, J., dissent-

This legislative determination is not entitled to less deference merely because it is contained in Appropriations Acts. Those Acts, like any other legislation, represent "determinations of policy" properly implemented through "bicameral passage followed by presentment to the President" (*INS v. Chadha*, 462 U.S. 919, 954-55 (1983)), and must be accorded due weight.[17] *United States v. Dickerson*, 310 U.S. 554, 555 (1940) ("There can be no doubt that . . . [Congress] could accomplish its purpose by an amendment to an appropriations bill, or otherwise."); see *United States v. Will*, 449 U.S. 200, 222 (1980). It would be inappropriate indeed for this Court to tell a co-equal branch of government that a specific statutory provision duly enacted by Congress and signed into law by the President, in full accord with the Constitution, is entitled to less weight because Congress chose to include it in an Appropriations Act, rather than to make it a separate piece of legislation. See *United States v. Will*, 449 U.S. 200 (1980).

4. *Congress had a sufficient factual basis for its action.*

Petitioner and its *amici*, following Judge Williams' dissent, also argue that Congress did not create a sufficient factual record to support its determination that increasing minority ownership would promote diversity of expression. They would require Congress to demonstrate

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ing)) is clearly inaccurate. Congress did not tell the Commission to maintain the status quo to allow time to study the matter. To the contrary, Congress told the Commission that there was *in Congress's view* no need for further study. See S. Rep. No. 182, 100th Cong., 1st Sess. 76-77 (1987). Congress's action can only be seen as a clear determination that the current policies are fully justified, and a mandate that they be continued.

[17] Petitioner's reliance on *TVA v. Hill*, 437 U.S. 153, 190 (1978), is misplaced. That case concerned whether an Appropriations Act should be construed to repeal prior legislation *by implication*. In contrast, the Appropriations Acts here specifically mandate continued implementation of the minority preference programs plainly and directly; there can be no doubt as to Congress's intent.

that there is an "empirically verifiable" definition of minority programming, that minority programming is currently inadequately supplied by the market, and that increasing minority ownership will increase the supply of minority programming. Pet. App. 22a (Williams, J., dissenting). This crabbed view of Congress's power misapprehends the nature of the legislative process, undervalues Congress's role in our constitutional system, and reflects inadequate appreciation for the sensitive First Amendment concerns at stake.

Under the standard employed in Judge Williams' dissent, legislative bodies would be required to make specific findings of fact, based strictly on evidence in the "record," that could be demonstrated to be true with the kind of certainty that is possible only in the physical sciences.[18] Legislative enactments would be subject to a stricter standard of review than decisions of a trial court, both as regards the type of evidence properly considered and the deference due the determination. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring).[19] Consequently, no matter how compelling the need, Congress would be powerless to adopt a race-conscious remedy where the nature of the problem did

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[18] In fact, the Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988), provides empirical support for Congress's conclusion. The alleged methodological flaws in this study that Judge Williams cited are of the type that, even in a court of law, which a legislature decidedly is not, would go to weight rather than admissibility. Pet. App. 23a-25a (William, J., dissenting).

[19] Findings of fact by a trial court generally must, of course, be upheld unless they are "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). The implicit premise of Judge Williams' dissent is that Congress's legislative determinations in this area cannot be upheld unless specific evidence in the "record" demonstrates to a virtual certainty that they are correct. Judge Williams' approach would put legislative bodies in a straightjacket guaranteeing that scrutiny will always be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J., concurring).

not lend itself to strict empirical proof, but instead depended upon human experience and judgment.

Although racial classifications are properly subject to searching scrutiny, the power of a legislature to adopt race-conscious remedies to further compelling purposes has never been held to be so narrow. "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.).[20] Even in *Bakke*, which involved only the policies of a university rather than a legislative enactment, Justice Powell did not demand "empirically verifiable" proof that racial diversity would facilitate the "robust exchange of ideas" and otherwise improve education. Instead, he relied on the opinions and experiences of educators, and observed that it "is widely believed" that diversity enriches the educational experience, and that "our tradition and experience lend support to the view that the contribution of diversity is substantial." 438 U.S. at 313.

A legislature's determinations are, of course, entitled to far greater deference than are those of a public university. *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). Moreover, the factual record here is far greater than that deemed sufficient by this Court in *Bakke*. Congress conducted repeated hearings at which it heard extensive testimony exploring the relationship between minority ownership and diversity of expression.[21]

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[20] When Congress enacts legislation, it is permitted to rely upon historical documentation and previous congressional findings and investigations; it is not necessary for Congress to make specific findings for each individual piece of legislation. *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring). Consequently, the 1982 Amendments and the hearings conducted by Congress in 1983, 1984, and 1986, as well as the Commission's prior investigations, must be considered to have been before Congress when it enacted the Appropriations Acts.

[21] There is an additional reason for appropriate deference to Congress here beyond those recognized in *Fullilove*. As this Court has stated, "[b]alancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty," and the "delicately balanced system of regulation" that Congress devised and must continually adjust to accommodate those competing interests ought not easily be disrupted by the courts. *CBS v. DNC*, 412 U.S. at 102. Thus, in evaluating a constitutional challenge to Congress's broadcast regulations, the Court "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.*

5. *Congress's determination does not depend on racial stereotyping.*

Congress's determination that racial minorities have a distinct viewpoint does not depend on racial stereotyping, or on any belief "that skin color is a sound basis for predicting behavior." Pet. App. 21a (Williams, J., dissenting). The facts, which Congress explored in hearings, are by no means so simple or mechanical as determining whether certain ethnic groups have distinct "tastes" and then measuring the amount of programming directed toward satisfying those tastes. As Justice Powell recognized in *Bakke*, we are all the product of our experiences; and diversity of programming implicates matters as rich, varied, and complex as all of human experience.

Members of racial and ethnic minority groups have something very important in common. As members of "discrete and insular minorities" (*United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)), they have faced a long, sorry history of discrimination. Persons from different backgrounds—"whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring experiences, outlooks, and ideas" that will enliven debate and promote learning. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.). It is no more "racial stereotyping" to conclude that the unique experience of members of minority groups will bring a different perspective to many issues, or that such groups will tend to have special interests in certain areas, than it is "stereotyping" to say that persons from different geographic areas or backgrounds will tend to have different perspectives and interests. Thus, for example, citizens of any race

may have a special interest in the history of slavery and segregation in the United States, or the abolition of apartheid in South Africa, and opinions of people of all races on those issues will vary. But whatever their views, black people will bring a different experience to bear on those issues than will white people, and it is not "racial stereotyping" to say so.[22] Congress properly determined that important First Amendment values are served by ensuring that racial minorities have an opportunity to make programming decisions.[23]

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[22] In the analogous context of protecting the right of racial minorities to effective political participation, the Court has adopted the fundamental premise of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, that racial minorities may have different political views than the white majority. For example, in *United Jewish Organizations*, the Court upheld redistricting by the State of New York that deliberately created nonwhite majorities in electoral districts in an effort to comply with Section 5's intent to "protect the opportunities for nonwhites to be elected to public office." 430 U.S. at 158-59 (plurality opinion). Conversely, in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), the Court affirmed the district court's holding that the City's annexations of two white areas and refusal to annex a black area could not pass muster under Section 5. The Court stated that government action "to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance," was "impermissible." *Id.* at 472.

[23] Petitioner and its *amici* suggest that *Bakke* is distinguishable because racial diversity in a student body tends to break down stereotypes as students interact with persons of other races, whereas in broadcasting the audience does not know the race of the broadcaster. But Justice Powell's rationale in *Bakke* was by no means so limited. He recognized that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body" (438 U.S. at 312), and that universities have a compelling First Amendment interest in selecting students who will contribute "most to the robust exchange of ideas." *Id.* at 313. Thus, the thrust of Justice Powell's analysis is that racial diversity leads to diversity of expression, and that its absence may impoverish debate by excluding an important perspective. These considerations apply with equal force to broadcasting, which both serves an educational function and plays an important role in national and local politics.

Likewise, promoting diversity of expression by increasing minority ownership of broadcast licenses does not in any way depend on an assumption that there is "some inherently non-measurable race-conduct link" that would allow government to "pursue diversity of conduct by allocating government benefits on a basis of racial proportions." Pet. App. 28a (Williams, J., dissenting). Congress was not concerned here merely with allocation of economic benefits, and it did not assume that minorities will think, act, or behave in any particular way, any more than Justice Powell made that assumption in *Bakke*. Rather, Congress recognized the fundamental First Amendment principle that everyone benefits when the public airwaves are open to expression by a wide diversity of speakers from different backgrounds. It does not require positing an "ineffable attribute" of minorities or assuming a "race-conduct link" (Pet. App. 27a-28a (Williams, J., dissenting)) to recognize that racial diversity in broadcasting furthers First Amendment goals.[24]

Moreover, the fact that audiences do not know a broadcaster's race eliminates one of the primary objections usually raised to racial classifications intended to aid minorities, including diversity admissions programs, *i.e.*, that they stigmatize their beneficiaries. See, *e.g.*, *Croson*, 109 S. Ct. at 721; *Bakke*, 438 U.S. at 298 (opinion of Powell, J.). Because the audience does not see the owner of a broadcasting facility, the audience has no cause to speculate about how he obtained his license. Each broadcaster will be judged on the merits of his programming.

[24] Recognizing the value of racial diversity to achieve diversity of expression in the special circumstance of selecting a student body or awarding broadcast licenses in no way permits government to avoid the constitutional limitations on government's use of race-based criteria when allocating economic benefits. In that context, government's interest is in ensuring that the process of allocation is free from the effects of present or past discrimination. Government may not engage in "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

C. The Minority Enhancement Program Is Narrowly Tailored To Its Purpose Of Promoting Diversity Of Expression.

1. *The minority enhancement program does not involve a quota or rigid numerical goal.*

This Court has expressed concern about race-based programs that include "rigid numerical quota[s]" (*Croson*, 109 S. Ct. at 728), and has generally preferred programs without "inflexible percentages solely based on race or ethnicity." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). See also *Bakke*, 438 U.S. at 316 (disapproving of "assignment of a fixed number of places to a minority group") (opinion of Powell, J.).

The Commission's minority enhancement program is significantly more flexible than the program approved in *Fullilove*, which involved a flat ten percent set-aside subject only to an administrative waiver provision. Nonminorities are free to compete for all licenses; no licenses are set aside exclusively for minorities; and race is considered only if all applicants are otherwise essentially equal, and then only as one factor. See *Bakke*, 433 U.S. at 314 (opinion of Powell, J.) (approving admissions programs in which race is one consideration). Moreover, there are alternative routes to obtaining a license—most notably private sales—in which race is not considered. It is difficult to imagine any meaningful policy that would less resemble "a rigid numerical quota" or an "inflexible percentage" and still serve the Commission's legitimate goals.

2. *The minority enhancement program does not impose an undue burden on nonminorities.*

This Court has never suggested, as the Acting Solicitor General implies, that a "narrowly tailored" program must not "injure innocent third parties." U.S. Br. 23. Indeed, to impose such a requirement would be to condemn virtually all race-based programs, however essential to the achievement of compelling purposes. By definition, a program giving any meaningful preference based

on race in allocating access to a scarce or fixed resource will impose some burden on nonminorities.

Thus, for example, an applicant for admission to college who is turned away in favor of a minority candidate pursuant to a race-conscious admissions program is injured in a real sense. But this Court approved such programs in *Bakke*, recognizing that the injury to the disappointed applicant is outweighed by the compelling interest in diversity. Similarly, the nonminority contractor denied a contract under the plan approved in *Fullilove* is injured, but the "relatively light" burden imposed on him does not render the program unconstitutional. 448 U.S. at 484 (opinion of Burger, C.J.). See also *Wygant*, 476 U.S. at 280-81 (plurality opinion) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").[25]

The pertinent inquiry is whether the inevitable burden of a race-conscious program on nonminorities is so great as to be intolerable, and particularly whether the program unreasonably "disrupt[s] . . . settled expectations." *Wygant*, 476 U.S. at 283 (plurality opinion). Here, petitioner was permitted to compete for the license, never had a right to obtain the license, and is not losing a license that it already owns. Although no doubt disappointed with the result of the comparative hearing, petitioner is not remotely in the same position as would be an incumbent licensee required to surrender a license to

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[25] It does not matter for this purpose that the goal is diversity of expression rather than direct "eradication of discrimination." Once there is a compelling purpose for a race-based program, then the issue becomes whether it is "narrowly tailored" to that purpose. One consideration in that regard is whether the program imposes an undue burden on nonminorities, and that analysis turns on an assessment of the actual burden imposed, not the purpose of the program. This Court has upheld programs imposing a relatively light burden on nonminorities whether the compelling purpose advanced was diversity, as in *Bakke*, ensuring minority voting rights, as in *United Jewish Organizations*, or redressing discrimination, as in *Fullilove*.

a minority broadcaster. The proper analogy, therefore, is not to a layoff, which places the "entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives" (*ibid.*), but to an affirmative action hiring program, in which the burden "is diffused to a considerable extent among society generally." *Id.* at 282. See also *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (approving affirmative action hiring plan under Title VII, noting that it did not require discharge of any employee).

The plea that the burden imposed on petitioner is unacceptable because this license represents a "unique opportunity" is unavailing. Petitioner may have preferred this particular license, but it has no more lost a "unique opportunity" than has the student denied admission to the college of his choice because of an affirmative action program, or the worker denied his best (and perhaps only) opportunity for employment or promotion because of a race-conscious plan. Indeed, an individual who loses a specific job opportunity or a promotion, or a student denied admission to the college of his choice, likely suffers a greater detriment than does a business entity that fails to obtain a specific license. As the Acting Solicitor General notes (U.S. Br. 21 n.12), "[l]arge numbers of radio and television stations are transferred each year in private transactions that appear to be routinely approved by the FCC"[26]; petitioner is free to pursue any of those licenses.

Moreover, a disappointed applicant hardly has grounds to complain that in choosing between applicants with essentially equal qualifications the Commission acted to further the strong public interest in diversity of expression, rather than basing its decision on some less important consideration or on the flip of a coin. In awarding

[26] Citing Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988), the Acting Solicitor General estimates (U.S. Br. 21 n.12) that "9% of all broadcast stations (representing roughly 1000 radio stations and 250 television stations) are sold in any given year (based on averages over the past 10 years)."

licenses the public interest must be the Commission's first and foremost consideration. Congress and the Commission have identified a compelling public interest in promoting diversity of expression, and it would be incongruous indeed if the Commission could not use that compelling interest to tip the balance between otherwise equally qualified applicants, neither of whom has any right to the license.

3. Effective race-neutral alternatives are not available.

In determining whether a particular program is narrowly tailored, this Court has also evaluated as one factor whether "lawful alternative and less restrictive means could have been used" instead of a race-based classification. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion); see *Croson*, 109 S. Ct. at 728 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)). Here, the Commission attempted to address the problem of underrepresentation of minority viewpoints through equal employment opportunity measures and ascertainment proceedings. After concluding that these measures were inadequate, the Commission adopted the minority enhancement program. It is simply not fair or accurate to say that race-neutral alternatives were not considered. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982).

In a very real sense, however, the Commission is foreclosed from pursuing the ostensibly most effective race-neutral alternative. As explained above, the First Amendment will not permit the Commission to regulate broadcasting content directly, nor is that result desirable. In a number of areas—not just with race—the Commission has followed the sensible course of seeking diversity among broadcasters as the best practical means to ensure diversity of expression. This approach does not reflect an inappropriate attempt to accomplish indirectly what the

Commission could not do directly, but rather furthers First Amendment values by facilitating expression of diverse views without involving government in the offensive business of regulating speech.

4. *The program's goal is not "too indeterminate."*

Following Judge Williams' dissent (Pet. App. 26a), petitioner argues that the minority enhancement program is not narrowly tailored because its goal of diversity in expression is too indeterminate for anyone to know when it has been accomplished.

But this objection evaporates with the recognition that Congress and the Commission acted within their power in determining that diversity of ownership will promote diversity of expression. The focus on ownership, rather than the elusive (and offensive) task of defining "minority programming," provides a ready measure of the minority enhancement program's success, *i.e.*, the number of minority broadcasters. Just as the Harvard admissions program attached as an appendix to Justice Powell's opinion in *Bakke* recognized that the number of minorities is important, but did not set any quota, so Congress and the Commission can look at the number of minority broadcasters without setting a quota. The infinitesimally small number of minorities now in the broadcast industry must be increased if diversity is to be achieved. Congress and the Commission can evaluate on an ongoing basis the continuing need for the minority enhancement program as the number of minority broadcasters increases.

This aspect of the program does not in any way render it "a stalking horse for making license ownership replicate the racial proportions of the population at large" (Pet. App. 27a (Williams, J., dissenting)) or "discrimination for its own sake" (*Bakke*, 438 U.S. at 307 (opinion of Powell, J.)). Congress and the Commission are not pursuing diversity of ownership as a goal in itself, but rather as an appropriate means to accomplish a compelling purpose, diversity of expression in broadcasting. This Court has never held that it is unlawful to encourage racial diversity among participants in a field of endeavor where necessary to accomplish an important purpose. To the contrary, *Bakke* approved just such a program. There is simply no basis in the record to think that Congress and the Commission have a secret, inappropriate purpose. Due respect for a co-equal branch of government precludes a court from engaging in speculation or making unsubstantiated assumptions about Congress's "real" motive. Cf. *Bakke*, 438 U.S. at 318 (opinion of Powell, J.) ("And a court would not assume that a university, professing to employ a facially nondiscriminatory admission policy, would operate it as a cover for the functional equivalent of a quota system.").

5. *The program is as narrow as it can be, consistent with the First Amendment.*

Petitioner also argues that the minority enhancement program is not narrowly tailored because it does not require an individualized determination whether a particular applicant will present "minority broadcasting." But the First Amendment considerations precluding direct regulation of broadcast content discussed above make it inappropriate to engage in such determinations. The approach endorsed by Congress is as narrow as it can be, consistent with important First Amendment values.[27]

In sum, this Court has never held that the factors discussed above are elements of a test, all of which must be fully satisfied for a program to be "narrowly tailored." Rather, the Court has examined these factors as considerations relevant to the determination of whether the program chosen by Congress fits closely with the goal to be advanced.

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[27] There is no call to reexamine here whether affirmative action plans designed to remedy discrimination may benefit individuals who were not themselves victims of discrimination. That issue is irrelevant where, as here and in *Bakke*, the program at issue has a compelling goal apart from remedying discrimination.

Here, the Commission's congressionally mandated policy of considering race as one factor in comparative licensing hearings alleviates the documented underrepresentation of minority viewpoints in broadcasting, without imposing an undue burden on nonminorities. The policy is carefully designed to respect both the sensitivity of classifications based on race and the important First Amendment values implicated by regulation of broadcasting. As such, the policy is "narrowly tailored" to its purpose of encouraging diversity of expression.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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METRO BROADCASTING, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, Et Al.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF GILES TELEVISION, INC. IN SUPPORT OF RESPONDENTS

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No. 89-453

In the

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, Et Al.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF GILES TELEVISION, INC. IN SUPPORT OF RESPONDENTS

Giles Television, Inc., by and through the undersigned counsel and with the written consent of the parties, respectfully submits this brief as *Amicus Curiae* in support of the Respondents. The letters of consent from the parties to this case have been filed concurrently with this Brief.

INTEREST OF *AMICUS CURIAE*

This case arises from a Fifth Amendment equal protection challenge to a federal statute that requires the Federal Communications Commission ("the FCC") to continue to use certain procedures in licensing radio and television stations. These procedures, in addition to other public interest purposes, are designed to overcome the barriers that, in the past, have prevented certain minority groups from entry into

broadcasting. The procedures allow minority status to be given substantial weight in evaluating the factors that are used in determining who should be granted a radio or television license in a comparative hearing. Minority status is not the only factor considered in these hearings. It is, though, one of the many factors considered to determine the best qualified applicant to hold the license in the public interest.

Giles Television, Inc. ("Giles Television") is an applicant for a television station license to be issued by the FCC. The application was designated for comparative hearing on April 27, 1988 and the hearing is now in progress. Giles Television is owned by an individual who qualifies as a minority under the current FCC comparative hearing procedures. The owner, who is an African American, is directly affected by the resolution of the constitutional issues presented in this case, as are all other minority entrepreneurs who have entered the field of broadcasting in response to the inducements to such ownership developed by the FCC and mandated by Congress.

SUMMARY OF ARGUMENT

Fifth Amendment review of a federal statute imposing a racial or ethnic classification should adhere to the standard of review established in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The statute must first be examined to determine whether the objectives of the classification are within the powers of Congress. This part of the review process includes an examination to determine whether the public purpose of the classification is *legitimate, i.e.*, substantial and supported by appropriate findings that there is a clear public need for the measures that Congress has adopted. The classification is then reviewed under the equal protection component of the Fifth Amendment to determine whether it is "narrowly tailored" to its objectives. This approach to a Fifth Amendment equal protection challenge is different in focus from the "strict scrutiny" standard of review applicable under the Fourteenth Amendment to state imposed racial and ethnic classifications. A different standard of review is required because the intent underlying the Fifth Amendment, and the

level of government that it affects, is fundamentally different from the Equal Protection Clause of the Fourteenth Amendment.

The statute under review in this case implements clearly legitimate and substantial national economic and remedial policies under the Commerce Clause, as well as diversity of opinion and viewpoint goals under the First Amendment. Those economic policies are to remove discriminatory barriers to minority entry into broadcast station ownership. In enacting the statute, Congress expressly referenced its earlier policy to remedy the lack of minority ownership in broadcasting, which it found to have stemmed from private racial and ethnic discrimination. These congressional findings are entitled to great weight, and are supported by ample evidence that such discriminatory barriers to commerce exist. Congress can, under the Commerce Clause, impose a "narrowly tailored" racial or ethnic classification system to remove these barriers, as can the FCC under the powers delegated to it in the Communications Act of 1934, as amended.

The classification imposed by the statute under review is "narrowly tailored" to its objectives. It does not impose a quota, nor create a situation where race or ethnicity is outcome determinative in the comparative hearing process. The classification is not over inclusive. Race or ethnicity is considered in the comparative hearing process only to the extent that minority ownership is integrated into the management of the station and thus more responsive to the program needs of the community to be served under the license. The classification does not unreasonably affect those who do not obtain its benefits, as their interest in a comparative hearing is an expectancy, not a vested right. Conversely, the classification does not harm minorities by stereotyping them as succeeding by reason of a factor not related to individual worth. Lastly, less intrusive remedies for the lack of minority ownership in broadcasting have been attempted but have not succeeded.

ARGUMENT

The classification mandated by the statute under review is used by the FCC in evaluating the qualifications to hold a radio or television license. Those licenses, which are usually referred to as "broadcast licenses", are granted either through a comparative hearing, 47 U.S.C. Section 309, or by random selection, 47 U.S.C. Section 309(i)(3)(A). Both methods of licensing include administrative procedures that promote diversity of minority broadcast station ownership. Only the procedures in comparative hearings, and the related statutory authority for them, are under review here. Nonetheless, the legislative and regulatory history of the similar minority ownership inducement procedures in random selection broadcast licensing is relevant and material to this case.

In broadcast license comparative hearings, a license applicant who is a member of certain minority groups is given "comparative merit" *vis-a-vis* competing non-minority applicants under certain limited circumstances. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981-982 (1978). There are two basic comparative factors that are weighed in these hearings, first, the extent of each applicant's other broadcast licenses or media holdings, and, second, the extent to which each applicant proposes to integrate its ownership into the active management of the station. *Statement of Policy on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-395 (1965). The applicant with the least other licenses or holdings is favored under the first factor without any weight given to minority status.

Under the second factor, the applicant who proposes maximum integration into management is favored. Minority status is considered under this factor. *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978). In such a case, minority status is considered a "substantial integration enhancement" favoring the minority applicant. *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 (1982), aff'd *sub nom., West Michigan Broadcasting Co. v FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985). Other integration

enhancements are considered "substantial" and have equal weight with minority status under the integration factor. Other factors of equal weight include local residence in the community to be served under the license and previous ownership of a "daytime only" AM radio station. *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 59 R.R.2d 1221, 1222 (1986).

The regulatory purpose of these comparative procedures is not to promote minority ownership of broadcast stations *per se*. As the FCC emphasized in its *Statement of Policy on Comparative Broadcast Hearings, supra* at 394-395, the purpose is to promote "maximum diffusion of control of the media of mass communications" and attain the "best practical service to the public". The first comparative factor aims at diffusion of control by favoring new entrants into the broadcast industry. The second factor aims at better programming by favoring applicants whose ownership is involved in management, and closer to the program needs of the community being served. This factor, as the FCC has said, also fosters diffusion of control in that individuals or entities holding multiple broadcast licenses or other media properties can seldom become involved in the active management of a particular station. *Id.* at 395.

The comparative hearing procedures for considering minority status were adopted in 1978 after the decisions in *TV 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). See *Statement of Policy on Minority Ownership of Broadcasting Facilities, supra* at 982 (1978). Subsequently, after the decision in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), the FCC sought to reconsider these procedures, even though *Steele* concerned only a gender preference in comparative hearings. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, MM Docket 80-484, 1 FCC Rcd 1315 (1986). Congress then intervened by passing the statute under review which, in effect, requires the FCC to continue to treat minority status as a "substantial integration enhancement". *Continuing*

Appropriations Act for the Fiscal Year 1988, Pub.L. No. 100-202, 101 Stat. 1329 (1988). In so doing, Congress also expressly referenced its 1982 legislation which required a similar treatment of minority status in random selection broadcast licensing. *Communication Amendments Act of 1982*, Pub.L. No. 97-259, 96 Stat. 1087 (1982), amending, 47 U.S.C. Section 309(i)(3)(A).

It is the position of this *Amicus Curiae* that Fifth Amendment review of Congress' legislative mandate concerning minority status as a license qualification should center on *the lawfulness of Congress' action and the public policy objectives underlying its action.* The Court is also urged to consider those objectives *in an economic policy context.* Both the statute under review and the 1982 legislation sought to implement fundamental economic and remedial policies under the Commerce Clause. U.S. Const., Art. I, Section 8. Those policies draw their origin from the 1968 Report of the National Advisory Commission on Civil Disorders ("the Kerner Commission"). The Kerner Commission recommended that the government encourage minority participation in the economy. The Kerner Commission, *1968 Report of the National Advisory Commission on Civil Disorders* 424 (Pantheon Ed. 1988). Many government initiatives are derived from that recommendation. See *Executive Order 11458*, 34 Fed.Reg. 4937 (March 5, 1969); *Executive Order 11518*, 35 Fed.Reg. 4939 (March 21, 1970); and *Executive Order 11625*, 36 Fed.Reg. 19,967 (October 13, 1971) directing federal agencies to support minority business enterprise programs.

The Report issued by the Kerner Commission and the severe problems of poverty and economic discrimination that it addressed should not be forgotten, or regarded merely as a matter of history. Deliverance of "equality of economic opportunity", and victory in "the battle against pernicious racial discrimination", is not yet anywhere near achieved. *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting). The Court is urged to consider minority enhancement programs in the unique economic setting of the broadcast industry, which depends on a finite

public resource to bring its product to the public, a resource which is regulated "in the public interest" by Congress and the FCC under the Commerce Clause. This is a far different situation from the ordinary private enterprise that depends on government for only the exercise of police and other general welfare powers. The Court is also asked to consider the personal and human dimension of the FCC's effort to increase minority broadcast ownership.

The plain fact is that minorities have been, for years, excluded from participating in the economic opportunities of broadcasting, either by reason of private discrimination or the operation of the "system". The FCC's minority enhancement procedures, together with the structured application rules that allow minorities, and other applicants, to overcome financing difficulties, offer the first light of a new day.[1] There is no constitutional or statutory basis to find these procedures invalid. Nonetheless, if they are, considerations of fairness and equity command that the holding be applied prospectively. Minority applicants now in the comparative hearing process have invested time, effort and substantial resources based in large measure on the inducement offered through the minority enhancement procedures in comparative hearings. They would not be in the process today but for this inducement, as history can attest. At a minimum, the hopes and expectations of minorities, if they are to be ended, should at least be limited to future comparative hearings, and not to those which are already in progress.

I. THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE IS THE *FULLILOVE V. KLUTZNICK* APPROACH TO A FIFTH AMENDMENT EQUAL PROTECTION CHALLENGE

The proper constitutional focus for review of the validity of the statute which commands the FCC to continue to

[1] Under the structured application rules individuals or entities that hold only a non-voting equity interest in the station are not considered as owners in determining the extent of integration. Applicants can thus obtain financing through limited partnerships or other commercial arrangements combining financing through "passive" investors and operational control in the owners that hold the voting stock. See *Cotton Broadcasting Co.*, 4 FCC Rcd. 1781, (1989) and *Daytona Broadcasting Co., Inc.*, 103 F.C.C. 2d 931 (1986).

use its minority enhancement procedures in comparative hearings is the Due Process Clause of the Fifth Amendment, U.S. Const., amend. V, and not the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., amend XIV, Section 1. Radio and television licensing is an area of commerce under exclusive federal regulation pursuant to Title III of the Communications Act of 1934, as amended, ("the Communications Act"). *Fisher's Blend Station, Inc. v. Tax Commission*, 297 U.S. 650, 655 (1936), citing, *FRC v. Nelson Bond Mortgage Co.*, 289 U.S. 266, 279 (1933). Unlike the regulation of telephony, 47 U.S.C. Section 152(b), there is no such thing as "intrastate" broadcast service.[2] The Equal Protection Clause of the Fourteenth Amendment is applicable only to governmental action by a state or its instrumentalities. *District of Columbia v. Carter*, 409 U.S. 418, 423 (1973). See also *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 719 (1989) (O'Connor, J., plurality opinion), citing, *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). The Amendment affects the federal government only in the sense that, under its Section 5, Congress has the power "to enforce" the Amendment through "appropriate legislation". U.S. Const., amend. XIV, Section 5.

The Fifth Amendment contains no equal protection language, although "due process", as a concept, certainly implies impartiality in federal governmental action. This *implied* equal protection component of the Fifth Amendment can in many cases create the same rights of citizenship as are conferred under the *express* mandate of the Fourteenth Amendment. But the two clauses are not co-extensive. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Where there are substantial and legitimate national interests involved, Congress can impose racial and ethnic classifica-

[2] In 1982 Congress amended Section 301 of Title III to specify that the regulatory authority delegated under it to the FCC extends to "all channels of radio transmission." 47 U.S.C. Section 301, as amended by, *Communication Amendments Act of 1982*, Pub. L. 97-259, 96 Stat. 1087 (1982). In enacting the amendment, Congress expressly stated that its purpose was to make it clear that broadcasting is, by nature, interstate, citing *Fisher's Blend Station, Inc., 297 U.S. 650*. See *H.R. Conf. Rep.* No. 97-765, 97th Cong., 1st Sess. 31-32 (1982).

tions, particularly for remedial purposes.[1] The principal recent case is *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where the Court upheld a federal statute imposing a racial and ethnic classification applicable to the distribution of public contracting funds. See also *Korematsu v. United States*, 323 U.S. 215 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Racial and ethnic classifications imposed by Congress require "close examination," *Fullilove*, 448 U.S. at 472, but the analysis used in *Fullilove* differs in focus from the "strict scrutiny" applied to state or local governmental classifications. The first step in the review of a racial or ethnic classification imposed by Congress is to determine if the "objectives" of the classification are within Congress' powers. *Fullilove*, 448 U.S. at 473. Subsumed in this test is also the requirement that the purpose of the classification must be legitimate and substantial, which is but another way of saying that the purpose must be real and based on adequate findings of a public purpose need. The emphasis is thus not on whether the public policy is "compelling" but on whether its objectives are legitimate.

When the objectives of a racial or ethnic classification are a lawful exercise of Congress' constitutional powers to achieve national public policy, the classification is valid, provided that it withstands scrutiny under the second step in the *Fullilove* analysis, which is to determine whether the classification is a "constitutionally permissible *means* for achieving the congressional objectives". *Id.* [Emphasis in the original.] This prong of the analysis essentially evaluates the classification in equal protection terms, i.e., whether the classification "narrowly tailored" to its objectives. *Id.* at 480.

The *Fullilove* approach is similar in concept to the standard of review developed in non-remedial gender classifica-

[1] "On the other hand: when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and *when there is not special national interest involved*, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." *Hampton v. Mow Sun Wong*, 426 U.S. at 100. [Emphasis supplied.]

tion cases. This standard requires that the classification serve legitimate and substantial governmental objectives and be substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197-199 (1976). See also *Schlesinger v. Ballard*, 419 U.S. 498, 507, 510 (1975), discussing, *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Reed v. Reed*, 404 U.S. 71 (1971). In those cases, the governmental purpose for the statutory gender classifications was found to be based on nothing more substantial than common discriminatory notions, *e.g.*, that women are not as able as men to handle business matters, or inadequate legislative findings to support the "public purpose" proffered for the classification. The reach of those classifications were also, in at least some of the cases, found to be "overly broad" in that they sought to classify all women the same for reasons that applied only to a limited number of those in the class. Although these cases involved non-remedial classifications, the standard of review used by the Court is to be preferred over the "strict scrutiny" standard developed in Fourteenth Amendment remedial classification cases.

There are several important reasons that commend use of the *Fullilove* approach to review of a Fifth Amendment equal protection challenge, as opposed to use of "strict scrutiny". Most importantly, the Equal Protection Clause of the Fourteenth Amendment was intended primarily as an absolute prohibition on racial or ethnic classifications. As this Court has found, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967), citing *inter alia*, *Slaughter House Cases*, 16 Wall 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880); and *Ex Parte Virginia*, 100 U.S. at 344-345. See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 291-295 (1978). The Due Process Clause of the Fifth Amendment, enacted much earlier in the nation's history, has no such racial or ethnic aspect to its origins or underlying intent. The "due process of law" clause of the Fifth Amendment was originally intended primarily to engraft into federal organic

law the procedural rights aspects of the "law of the land" clause in the *Magna Charta*.[4] See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1855). This is not to argue that the Fifth Amendment is only procedural in scope. Its implied equal protection component does not, however, carry the same absolute nature, history, or intent as the Equal Protection Clause.

In addition, there are other differences that require a different standard of review. First, the two constitutional provisions are directed at different levels of governmental authority. The power of Congress, particularly in the area of remedial action to remove barriers to commerce, is more extensive than those of state or local government. *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). Second, Congress as a co-equal branch of government has more discretion in determining that such barriers exist, and in choosing an appropriate remedy. *Richmond*, 109 S.Ct. at 718-719 (O'Connor, J., plurality opinion). Third, Congress occupies the highest level of representative government, where there is the maximum diffusion of the parochial interests that can lead to politics of racial hostility. Madison, *The Federalist*, No. XV 86-88 (Legal Classics Library Ed. 1983). Lastly, the *Fullilove* approach allows for an evaluation of Congress' national policy objectives to determine if the purpose of a classification "transcends the harm to the members of the disadvantaged class." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453 (1985) (Stevens, J., concurring).

Moreover, the seemingly endless debate that has accompanied the adoption of "strict scrutiny" should be avoided in Fifth Amendment equal protection cases. This debate, filled as it is with questions concerning the application of concepts such as "heightened scrutiny", "intermediate scrutiny", "compelling governmental interests", obscures the more important issues. These issues, this *amicus curiae* submits, are,

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[4] "No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled, or injured in any way . . . except by the lawful judgment of his peers, or by the law of the land." *Magna Charta*, Chapter 39, reprinted in, *Appendix Vol. 11, Guide to American Law* 245, 251 (West Publishing Co. 1985).

first, *whether the governmental authority has the power to achieve the objective of a racial or ethnic classification*, and, second, *whether the purpose is legitimate and substantial*. Once these questions are answered in the affirmative, the second prong of the *Fullilove* approach comes into play. The classification must be examined under the equal protection component of the Fifth Amendment to determine if it is rational, in other words whether the scope and extent of the classification is "narrowly tailored" to the achievement of its purposes.

II. THE OBJECTIVES OF THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE TO ACHIEVE DIVERSITY OF BROADCAST STATION OWNERSHIP WHICH FOSTERS SUBSTANTIAL NATIONAL ECONOMIC AND REMEDIAL POLICIES AS WELL AS FIRST AMENDMENT GOALS

The legislative and regulatory initiatives at issue in this case seek *to achieve substantial national public policy objectives, including economic diversity of broadcast station ownership*. It is far too late in the history of the Communications Act of 1934, as amended, 47 U.S.C. Section 101 *et seq.*, to argue that diversity as a concept does not carry with it important First Amendment goals. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-391 (1969). Much more, however, is involved in understanding diversity, particularly its economic and remedial aspects. The foundation of the concept is that radio and television depends for its very existence on the availability of a finite public resource, the electromagnetic spectrum. Diversity seeks to insure, to the extent possible, that this resource is not monopolized either through economic concentrations of ownership, or by reason of unfair or discriminatory barriers that exclude large

sections of the public from sharing in the economic benefits of the spectrum as a public resource, which are substantial.[5]

These economic and remedial goals are readily apparent in the Congressional intent underlying the statute being reviewed in this case. The statute was originally enacted as a part of the 1988 continuing appropriations act. *Continuing Appropriations Act for the Fiscal Year 1988*, Pub.L. No. 100-202, 101 Stat. 1329 (1988). The statute has been reenacted two times since and remains in effect today.[6] In the words of the original Senate authors of the measure, it prohibits the FCC from spending any funds to "repeal" or "restrict" its current "rules" which "promote ownership of broadcast licenses" by minorities, including the minority "preference" in comparative hearings.[7] The authors of the statute also saw this "preference" as promoting "diversity" of radio and television station "ownership" and serving "important public interest goals" such as "diversity of programming" and "improved service to minority audiences". *S. Rep.* No. 182, 100th Cong., 1st Sess. 75 (1987).

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[5] Although the spectrum used for broadcasting is made available by the federal government at no charge to the licensee, station ownership is an extraordinarily valuable economic asset, frequently sold to others for substantial prices. A network affiliated television station in Louisville, Kentucky, for example, commanded a selling price of $85.7 million in 1986. An independent television station in the Bloomington, Indiana, area sold for $73 million in 1985. Even a day-time only AM radio station in Tacoma, Washington, sold for $2.0 million in the same year. Paul Kagan Associates, Inc. *Kagan's Record of TV Station Deals, 1981-1988* (1989); Paul Kagan Associates, Inc. *Kagan's Record of Radio Station Deals, 1981-1988* (1989).

[6] *Departments of Commerce, Justice & State, the Judiciary and Related Agencies Appropriation Act of 1989*, Pub.L. No.100-459, 102 Stat. 2216 (1988); *Departments of Commerce, Justice & State, the Judiciary and Related Agencies Appropriations Act of 1990*, Pub.L. No. 101-162, 103 Stat. 1020 (1989).

[7] Those "rules" mandated by Congress to remain in effect plainly included the FCC comparative hearing procedures under review in this case. After discussing their intent to prohibit repeal of the "rules" promoting minority "ownership", the Senate Committee quoted from *Steele v. FCC*, 770 F.2d at 1196, where with reference to the procedures in comparative hearings, the Court said the FCC's "authority to adopt minority preferences. . . is clear." *S. Rep.* No. 182, 100th Cong., 1st Sess. 75 (1987).

In addition to these First Amendment goals, the Senate authors of the statute referenced Congress' findings in the 1982 legislation authorizing the FCC to use random selection as an alternate licensing method to comparative hearings. *Id.* at 76. In this legislation Congress amended Section 309 of the Communications Act to grant the FCC the statutory authority it sought.[8] Congress required, however, that "significant preferences" be granted to minorities in the random selection of broadcast licenses. *Communication Amendments Act of 1982*, Pub.L. No. 97-259, 96 Stat. 1087 (1982), amending, 47 U.S.C. 309(i)(3)(A). Congress made three crucial findings in connection with this legislation. First, minorities have been "extremely underrepresented" in media ownership.[9] Second, minority preferences in licensing could serve to "diversify" the "sources of information" on the airwaves. Third, "past inequities stemming from racial and ethnic discrimination" have resulted in the lack of minority involvement in broadcast station ownership. Fourth, minority preferences in licensing provides "one means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications . . . ." *H.R. Conf. Rep.* No. 765, 97th Cong., 1st Sess. 43-44 (1982).

The 1982 legislation and the statute under review in this case cannot be viewed as separate and distinct. The sponsors of the 1988 appropriations provision "expressly linked" their objectives with those of Congress in 1982. See *Fullilove*, 448 U.S. at 463, where the preference under review was enacted as a 1977 appropriations provision similarly "linked" in terms of Congressional intent with earlier legislation. More-

[8] Statutory authority for use of random selection was sought by the FCC primarily to minimize use of comparative hearings and thus expedite service to the public and avoid regulatory cost. *Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 88 F.C.C.2d 476, 477-478 (1981).

[9] The House Conference Report on the 1982 amendments notes that in 1981, only about two percent of all commercial and non-commercial broadcast stations were minority owned. *H.R. Conf. Rep.* No. 765, 97th Cong., 1st Sess. 43-44 (1982).

over, both the statute *sub judice* and the random selection amendments concern the same subject, *i.e.*, radio and television licensing, and implement the same national policy, *i.e.*, diversity of station ownership. Indeed, Congress made it clear that the "minority preference" required in the 1982 amendments applied only to broadcast or other licenses used in the provision of "information or mass media services." *H.R. Conf. Rep.* No. 765, *supra* at 41. It required no preference for random selection of non-broadcast common carrier licenses.

It is in this framework of a clear statutory mandate to the FCC, supported by express findings of intent by Congress to require use of existing minority preference procedures, that this case must be viewed. Every action taken by the FCC has been pursuant to either judicial or legislative directive. The agency has by no means undertaken these actions on its own. See *Hampton v. Mow Sun Wong*, 426 U.S. at 103-105. The diversity objectives of the racial and ethnic classification underlying the minority preference must also be viewed in a broad context. They are not limited solely to First Amendment concerns. The goals of the classification system are a combination of various national policies, particularly economic and remedial policies along with the diversity of opinion and viewpoint that is at the heart of the First Amendment.

III. THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE A LAWFUL EXERCISE BY CONGRESS OF THE COMMERCE POWER AND WITHIN THE FCC'S DELEGATED POWERS UNDER THE COMMUNICATIONS ACT OF 1934

The 1988 appropriation provision and its subsequent reenactments are a *lawful exercise of Congress' power over commerce.* They implement clearly legitimate and substantial economic and remedial goals, as well as First Amendment diversity of opinion and viewpoint objectives. These objectives are superior to the interests of those who may not benefit from the classification, primarily because those parties have

no right, claim or vested interest in the spectrum used for broadcast service, which, under the Communications Act, is a finite public resource to be distributed by the FCC pursuant to the "public interest" standard mandated by Congress.

A. THE 1988 APPROPRIATIONS PROVISION AND ITS SUBSEQUENT ENACTMENTS ARE LAWFUL EXERCISES BY CONGRESS OF THE COMMERCE POWER

The radio and television licensing system established by Congress in Title III of the Communications Act is "a proper exercise of its power over commerce." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 227 (1943). In this area of commerce, subject as it is to exclusive federal control, Congress' powers are plenary. Those powers encompass remedial measures to correct the effects of private discrimination. See *Heart of Atlanta Motel, Inc. v United States*, 379 U.S. 241, 257 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964), where "this Court held that Congress had the power under the Commerce Clause to prohibit racial discrimination in public restaurants on the basis of its 'finding[s] that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce.' " *Fullilove, supra* at 499 (Powell, J., concurring). It was only because private and *state* discrimination was involved in *Fullilove* that the Court needed to go beyond the Commerce Clause to find a source of federal power to impose the preference at issue there. *Fullilove*, 448 U.S. at 476, discussing the enforcement provisions of Section 5 of the Fourteenth Amendment.

The policy foundation of the 1988 appropriations statute and subsequent legislation is Congress' 1982 finding that there is a lack of minority ownership in the broadcast industry *as a whole*, which stems from "racial and ethnic discrimination". *H.R. Conf. Rep.* No. 765, *supra* at 43. It saw the effect of this discrimination as impairing minority access to the broadcast industry, "as it has adversely affected their participation in other sectors of the economy as well." *Id.* It takes no act of legerdemain to perceive that these findings are the

same as in *Katzenbach*, 379 U.S. at 304, where Congress *prohibited* discrimination, and *Fullilove*, 448 U.S. at 478, where Congress created a classification system to *remedy* discrimination. In this case, Congress has found that there are barriers to entry into the broadcast industry resulting from private discrimination and it can, under the Commerce Clause, adopt appropriate remedial measures. Given Congress' plenary power over commerce, it need not have found that the barriers to entry result from *discrimination*. The mere finding of barriers to commerce, standing alone, would have been constitutionally sufficient, especially when the distribution of a scarce public resource is involved and a substantial portion of the economy is, for whatever reason, unable to participate in its benefits.

Congress' findings as to economic conditions in the broadcast industry are entitled to "great weight." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The Court need not search behind those findings to review the weight or sufficiency of the evidence on which Congress based its actions. *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976). Congress as a legislative body is not required "to make findings of fact and conclusions of law", and it may call on its collective "experience" gained from repeated legislation "in an area of national concern." *Fullilove, supra* at 502-503 (Powell, J., concurring). Even in the Fourteenth Amendment cases, members of the Court have recognized that congressional findings on matters of national policy are unique. The "degree of specificity" required for congressional findings, and the "breath of discretion" that it has, is considerably different from that of a state or local government. *Richmond*, 109 S. Ct. at 719 (O'Connor, J., plurality opinion.)

The evidence of the private discrimination on which Congress acted is, nonetheless, manifest. The record before Congress when it made its findings as to economic discrimination in the broadcast industry included numerous congressional hearings and the FCC's own study conducted by its Minority Task Force. *Report on Minority Ownership in Broadcasting* 9, 24-25, 26 (May 17, 1978), cited as part of the record, *H.R. Conf. Rep.*, No. 765, *supra* at 44. The

Minority Task Force Report documents a pattern of private economic discrimination aimed at minorities, including: brokers refusing to disclose information on station availability to minorities; rating methods that "inaccurately" suppres the estimated audience for minority owned stations; and the prevalent "notion" that minority customers are "unimportant" or do not represent a particularly "lucrative market". The Task Force, in sum, found that minority ownership is restricted "because of a lack of capital, limited experience and racism." This is no "amorphous claim of societal discrimination", *Richmond*, 109 S. Ct. at 723-724, but the same type of barriers to entry that the Court relied on in *Fullilove*, 448 U.S. at 477-478, as ample support for Congress' findings.

B. THE FCC'S REGULATORY ACTIONS CONCERNING MINORITY STATUS IN EVALUATING LICENSE QUALIFICATIONS ARE A VALID EXERCISE OF DELEGATED POWER

The FCC procedures that consider minority status in broadcast comparative hearings have, since the enactment of the statute under review, been pursuant to its express statutory mandate. There is, thus, no question that those procedures are an exercise of delegated authority conferred on it by Congress. This is not to suggest the FCC lacked authority for its procedures prior to the enactment of the appropriations provision. Under the "public interest" standard established by Congress in the Communications Act, the FCC may consider many national policy objectives in making licensing decisions. Those objectives include diversification of the sources of opinion and point of view in the broadcast media. They can include measures designed to remove barriers to minority access to broadcasting.

The core of the FCC's grant of delegated authority is in Sections 308 and 309 of the Act, which allows the FCC to consider a licensee's "citizenship, character, financial, technical and other qualifications." 47 U.S.C. Section 308 and 309. The essential premise of these provisions is that "the physical scarcity of broadcast frequencies, as well as

problems of interference between broadcast signals, led Congress to delegate broad authority to the [FCC] to allocate broadcast licenses 'in the public interest.' " *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 795. Under this standard, the spectrum used for broadcasting is treated as a public resource. 47 U.S.C. Section 301. Licenses create no "property rights". They may be "revoked, and need not be renewed." The spectrum used by one licensee may be reassigned "in the interest of the listening public." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). See also, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940).

Under these provisions, federal economic policy may be considered in determining whether the statutory mandate of the public interest, convenience, and necessity will be served in granting a license. *National Broadcasting Co., Inc. v. United States*, 319 U.S. at 222-224. Those economic policies include antitrust objectives. *United States v. RCA*, 358 U.S. 334, 351 (1959). Other more general economic diversity policies are also included in the public interest mandate. The FCC can lawfully limit the number of licenses that may be held by an individual or entity, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-204 (1956), and limit cross ownership of broadcast and other media, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 795. Significantly, in neither case did the Court require the FCC to find antitrust violations, or even conduct in restraint of trade, before imposing limitations on ownership of universal application to all licensees. The objective of diversity of economic control of the spectrum *per se* was sufficient.[10]

Similarly, First Amendment goals are valid objectives under the FCC's statutory mandate. As this Court has held, promoting diversity of station ownership to achieve a broader range of viewpoint and opinion is within the FCC's power, along with directly promoting diversity of opinion on the airwaves. *Red Lion Broadcasting v. FCC*, 395 U.S. at 390.

[10] The FCC's Rules also contain extensive regulations limiting multiple ownership of broadcast or other media holdings, including newspapers or other newsprint media. See 47 C.F.R. 73.3555

This does not suggest that the FCC is, under its public interest mandate, a guardian of the public economic welfare, or an arbiter of broadcast programming. As this Court held in *NAACP v. FPC*, 425 U.S. 662, 669 (1975), "in order to give content and meaning to the words 'public interest' . . . it is necessary to look at the purpose" for which the Act was adopted. The legislative intent of Congress, though, in this case is manifest. The intent of Congress that the FCC use its licensing power to prohibit *economic concentrations* of control over broadcasting is fully recognized in *National Broadcasting Co., Inc. v. United States*, 319 U.S. at 221 n. 5, as it is with respect to *ideological diversity* in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 379 n. 7 (1968).

The FCC is likewise authorized to redress economic or other forms of barriers to entry into broadcasting under the Communications Act, provided that the exercise of that power is pursuant to a public interest objective in broadcasting. In *NAACP v. FPC*, 425 U.S. at 670 n.7, this Court observed that, unlike the FPC, the public interest mandate of the FCC brings with it broad goals of diversity that can include race conscious remedial measures. It commented that the FCC's regulations promoting increased minority employment in broadcasting "could be justified as necessary to enable [it] to satisfy its obligations" under the Act. These regulations established minority employment goals, required affirmative action programs and imposed minority employment reporting requirements on licensees. The Court saw these measures as fulfilling public interest obligations to "ensure that its licensees programming fairly reflects the tastes and viewpoints of minority groups."

This is not to suggest that the FCC has the power to enforce antitrust or civil rights laws *per se*, or that it can regulate programming, except to the extent of unprotected speech. *Red Lion Broadcasting v. FCC*, 395 U.S. at 389-390 and 47 U.S.C. Section 326. Its licensing power over the spectrum as a public resource does, however, give it the means to implement the diversity policies established by Congress. This power is to be exercised not for the benefit of broadcasters, but for the public, to insure that the economic

and free expression benefits of the public resource are distributed as widely as possible.

IV. THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE NARROWLY TAILORED TO THEIR OBJECTIVE AND DO NOT IMPOSE AN OVERLY BROAD OR IRRATIONAL CLASSIFICATION

The second prong of the *Fullilove* Fifth Amendment equal protection analysis requires examination of a racial or ethnic classification to determine if it is "narrowly tailored" to its objective. This aspect of the analysis was only partially explored in the decision because the case involved a "facial" challenge to the federal statute. As the Court explained, the statute was challenged "on its face" without any attempt to show that it resulted in constitutional or statutory violations "as applied in identified situations". *Fullilove*, 448 U.S. at 480-481. The Court, nonetheless, rejected the argument that the classification was "overinclusive". It found that administrative procedure in the program, which allowed a waiver of the preference on a showing that competing minority contractors had not suffered past discrimination, was sufficient, at least on its face, to insure that the program was limited to its remedial purposes. *Fullilove*, 448 U.S. at 486-489.

The FCC procedures at issue *sub judice* are "narrowly tailored" to their objective not only on their face but also as applied. Although the "narrowly tailored" requirement has never been defined in any one decision, its elements appear to include an examination of four criteria: first, the structure of the classification; second, its scope and duration; third, its effect on those excluded; and, fourth, the availability of less intrusive remedies. The FCC procedures here meet each of these elements.

Most importantly, *the structure of the FCC's procedures does not impose a quota or seek merely to balance racial numbers.* There is no fixed number of licenses to be awarded to minorities. Minority status is given weight only when it

is combined with other factors—principally integration into management and local residence—that serve the ultimate public purpose goal of the classification. Moreover, minority status does not automatically prevail even when combined with total integration and local residence. As the FCC emphasized in its *Statement of Policy on Comparative Broadcast Hearings, supra* at 393, 399, other factors can be considered in the hearing process and the guidelines established in the *Policy Statement* are "not intended to preclude the full examination of any relevant and substantial factor." In short, minority status is not outcome determinative in the comparative hearing process. To the contrary, the the comparative hearing procedures are "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Regents of the University of California v. Bakke*, 438 U.S. at 317 (1978). Under such circumstances, the procedures cannot be considered as harmful to minorities, or as tending to stereotype them. Minority status is a "plus" factor, but they are not insulated from competition, or from comparison.

Second, *the FCC procedures are not overinclusive, nor are these procedures without limit as to their duration and effect.* The procedures aim at increased minority participation in broadcast ownership so as to expand economic opportunity and the sources of opinion and viewpoint on the airwaves. These procedures, however, are applied in a comparative hearing process that is neither inflexible or automatic in its application. The current dearth of minority ownership is so severe that an integrated minority applicant with local residence may seem to prevail in most cases. This is, however, not required under these procedures, nor likely to continue indefinitely. Upon a proper showing that there is already ample minority broadcast ownership in the community, the FCC can, under existing procedures, award the license to a competing non-minority applicant. Even in the case of the primary comparative factor, diversity of broadcast ownership, an applicant with less media holdings than a competing

applicant does not necessarily receive substantial comparative merit if, in the community to be served, there is already ample enough diversity of media interests that strict application of the diversity factor is not required. See *WPIX, Inc.*, 68 F.C.C.2d, at 409 (1978).

Third, *the comparative consideration given to minority applicants does not overly burden other applicants.* The comparative hearing procedures do not involve a contest between a minority applicant and an *existing* licensee. They are applied in the context of a contest between two or more applicants which are vying for the same license, and which, ideally, have no other attributable broadcast interests. When and if the minority applicant prevails, the non-minority applicant has lost an expectancy but not a vested interest. Thus, the situation is analogous to the balancing of interests in employment affirmative action cases where the Court has recognized that the goals of improving employment of minorities transcend the harm to non-minorities when they potentially lose the expectancy of employment, as opposed to loss of actual employment. Compare *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) with *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281-283 (1986).

Lastly, the FCC has also *tried less intrusive remedies and found them to have failed to significantly increase minority broadcast ownership.* Prior to its *Policy Statement on Minority Ownership of Broadcasting Facilities, supra* at 981, the FCC implemented a host of "race-neutral" programs. These measures included the basic comparative factors themselves which, prior to specific consideration of minority status, sought generally to promote wider diffusion of broadcast station ownership. The FCC also implemented measures to require ascertainment of minority and other community programming needs. *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976). In addition, it required fair employment practices and reporting. *NAACP v. FCC*, 425 U.S. at n.7. In its *Policy Statement*, though, it found that those remedies had proven inadequate and ineffective. On the other hand, the inclusion of minority status as a "substantial integration enhancement", along with

the parallel policy decision to allow structured broadcast applications, has proven effective. The comparative factor has induced substantial minority participation and success in the comparative hearing process,[11] while the structured application policy has overcome the financing problems that have heretofore plagued minorities interested in the economic opportunities afforded by broadcasting.

CONCLUSION

The classification imposed by Congress under the 1988 appropriations provision and renewed each year since is a lawful exercise of its power under the Commerce Clause. Congress has found that there are discriminatory barriers to entry into the broadcast industry. It may properly impose a closely drawn racial classification designed to remove those barriers. The classification involved fully complies with the equal protection component of the Fifth Amendment and, as such, is constitutional. The judgement below accordingly should be affirmed.

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[11] See Petitioner's Brief on the merits at p. 23, n. 59.

FOR ARGUMENT

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IN THE

Supreme Court of the United States

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. Through its national office in Washington, D.C., and its several affiliate Lawyers' Committees, such as the Washington, D.C., Lawyers' Committee for Civil Rights Under Law, the organization has over the past 27 years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, mu-

nicipal services, the administration of justice, and law enforcement.[1]

SUMMARY OF ARGUMENT

Racial and ethnic discrimination continues to impose significant barriers to the opportunities of minorities throughout our society. Congress has unique power and competence to identify and remedy the effects of this society-wide discrimination, and should be given latitude to utilize racial preferences where it concludes they are appropriate. This congressional power stems in large measure from the Reconstruction era amendments, which gave Congress preeminent authority over matters of race and entrusted Congress to enforce the constitutional guarantees of equality.

In this case, Congress has confronted the tangible present-day effects of society-wide discrimination on the vitally important broadcast industry. It has concluded that this discrimination has resulted in the virtual absence of minorities from the ranks of owners of broadcast licenses, which in turn has practically excluded minority viewpoints from the airwaves. In addition to the interest in remedying discrimination for its own sake, Congress has a substantial interest in promoting a diversity of perspectives in broadcasting. And, Congress has good reason to believe that a minority preference policy in awarding broadcast licenses will in fact enhance diversity in broadcasting. This diversity interest further supports Congress' use of racial preferences.

Congress' action is entitled to substantial deference by this Court. Although there must be judicial review of the factual support underlying any race-based measure, here that review must take into account Congress' wealth of experience in addressing the problems of discrimination and its familiarity with the realities and complexities of

[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

the broadcasting industry. Similarly, while the minority preference should be narrowly tailored to its objectives, Congress must have leeway in its choice of means. It should be permitted to employ group remedies that do not require its beneficiaries to prove they are "victims" of discrimination, and that place some burden on nonminorities without upsetting firmly rooted expectations.

ARGUMENT

This case concerns the power of Congress to respond to problems caused by racial and ethnic discrimination in our society. The Lawyers' Committee for Civil Rights Under Law believes that Congress has unique competence to identify these problems and must be given the necessary latitude to address them. This principle was at the core of a series of landmark decisions more than two decades ago in which this Court upheld sweeping federal legislation designed to combat society-wide discrimination against racial and ethnic minorities.[2] It was also this principle that guided this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), upholding Congress' de-

[2] *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 (1968) (42 U.S.C. § 1982 intended to address society-wide racial discrimination that was "herd[ing] men into ghettos and mak[ing] their ability to buy property turn on the color of their skin"); *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (section 4(e) of Voting Rights Act designed to guarantee equal rights to all Americans); *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (Voting Rights Act deemed appropriate response to the "insidious and pervasive evil" of racism); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (characterizing the racial discrimination prohibited by Title III of 1964 Civil Rights Act as a problem of "nationwide scope"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (describing society-wide discrimination as "a moral problem" with "disruptive effects"); *see also Oregon v. Mitchell*, 400 U.S. 112, 133 (1970) (opinion of Black, J.) (since racial and ethnic discrimination is "a serious national dilemma that touches every corner of our land," Congress has power to "deal with [this problem] with nationwide legislation").

termination that in order to redress the lingering effects of past racial and ethnic discrimination on public contracting, it was necessary to take the race and ethnicity of contractors into account.

This principle of congressional competence carries even greater force in this case, because here Congress is addressing the consequences of past racial and ethnic discrimination in an area of vital national concern—broadcasting—over which it traditionally has exercised broad oversight.[3] Congress has concluded that the virtual absence of minorities from the ranks of owners of broadcast licenses is a result of past society-wide discrimination, and has limited the diversity of perspectives conveyed over the nation's airwaves.[4] The preference granted to minorities in comparative licensing proceedings reflects a considered response on the part of Congress to this deeply vexing problem.[5] We urge the Court to uphold it.

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[3] *See FCC v. League of Women Voters*, 468 U.S. 364, 376-77 (1984) (Court has "long recognized" that Congress must have ability to regulate "scarce and valuable resource" of broadcast licenses and "seek to assure that the public receives . . . a balanced presentation of information on issues of public importance"); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) (Court must review challenges to broadcast regulation mindful of Congress' extensive role in "the development of our broadcast system [for] over [a] half century").

[4] Some defenders of the minority preference policy have argued that its objective is not to remedy the effects of past discrimination, but rather to serve the "non-remedial" objective of promoting a diversity of perspectives in broadcasting. While the policy does have this diversity objective, *see infra* Part II, its "non-remedial" elements cannot be divorced from the remedial elements. For if not for past discrimination, there would be no need to take affirmative steps to increase minority ownership of broadcast licenses as a means of increasing the diversity of perspectives to which the television and radio audience is exposed.

[5] Congress clearly has acted here. After holding a series of hearings between 1982 and 1987 on minority ownership of broadcast licenses, Congress ordered the FCC to continue granting a minority preference in comparative proceedings. That directive, which came in the 1987 appropriations bill, passed both the House of Representatives and the Senate, and was signed into law by the President. *See* Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). Congress issued similar directives to the FCC in the 1988 and 1989 appropriations bills. *See* Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989). Together, the three measures demonstrate that the minority preference policy is one that is mandated by Congress.

I. CONGRESS MAY USE MINORITY PREFERENCES TO REMEDY THE PRESENT EFFECTS OF SOCIETY-WIDE DISCRIMINATION ON BROADCASTING

A. Congress Must Be Allowed to Remedy the Consequences of Society-Wide Discrimination Through Race-Conscious Measures

Our nation still suffers from the legacy of racial discrimination. In many sectors of our society, the gaps between minorities and nonminorities are enormous.[6] While other factors also may be at work, society-wide discrimination is responsible, in large part, for our failure to resolve what in 1944 Gunnar Myrdal labeled the "American

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[6] The evidence of continuing discrimination-related disparities between the races is by now disturbingly familiar: Minorities are disproportionately trapped in the cycle of poverty and crime that grips our inner cities; their educational achievements lag far behind those of nonminorities; and they are far more likely to feel alienated from, and disillusioned with, our nation's political and social institutions. *See, e.g.*, B. Blauner, *Black Lives, White Lives: Three Decades of Race Relations in America* (1989); C. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* (1987); W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (1987); *The Mexican American Experience: An Interdisciplinary Anthology* (R. de la Garza ed. 1985); Committee on the Status of Black Americans, *A Common Destiny: Blacks in American Society* (1989); American Council on Education and the Education Commission of the States, *One-Third of a Nation: A Report of the Commission on Minority Participation in Education and American Life* (1988); U.S. Dept. of Commerce, *Statistical Abstract of the United States*, Tables 634, 747 (1989).

Dilemma." [7] Congress must be permitted to address the present-day consequences of past society-wide discrimination, through race-conscious measures if appropriate.

1. *Past society-wide discrimination has concrete effects today that Congress must have latitude to address*

Where society-wide discrimination has resulted in specific identifiable problems—in this case, a virtual absence of minority broadcasters and an accompanying lack of diversity in broadcasting—it is not an "amorphous" concept that is "ageless in its reach into the past." [8] Rather, it is a concrete, tangible phenomenon that continues to haunt us. In view of the formidable barriers that society-wide discrimination still poses to the opportunities of minorities, "Congress properly may—and indeed must—address directly the problems of discrimination in our society," and in some situations must be able to do so through race-conscious means.[9]

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[7] G. Myrdal, *An American Dilemma: The Negro Problem and Modern American Democracy* (1944). As a report released by the National Research Council only last year conclusively demonstrates, Myrdal's label is, unfortunately, still an apt one. *See A Common Destiny, supra* note 6, at 5 ("legacy of discrimination and segregation" continues to hinder attempts by black Americans to "remov[e] barriers" to full participation in society). That report also reveals the persistence of the problems that were described in the seminal 1968 Report of the National Advisory Commission on Civil Disorders [hereinafter *"Kerner Commission Report"*]. *See also* K. Karst, *Belonging to America: Equal Citizenship and the Constitution* ch. 9 (1989) (past discrimination is contributing factor to the condition of minorities who constitute a disproportionate percentage of the marginalized poor in America).

[8] *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

[9] *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). *See id.* at 482 (opinion of Burger, C.J.) ("[w]e reject the contention that in the remedial context Congress must act in a wholly 'color-blind' fashion").

Like this case, *Fullilove* involved congressional action to remedy a problem in an important industry, public contracting, caused by the continuing effects of past discrimination. In adopting the race-conscious measure at issue there, Congress concluded that existing race-neutral procurement practices were resulting in the "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." 448 U.S. at 473 (opinion of Burger, C.J.).[10] Notably, these were "barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478 (opinion of Burger, C.J.). Because race-neutral action only reinforced a racially skewed system of contracting, Congress decided that race-conscious action was appropriate to overcome the legacy of discrimination.

Last term's decision in *Croson* reaffirmed that Congress may predicate race-conscious action on the need to cure the identified present-day consequences of past society-wide discrimination. The plurality declared that while state and local governments may use race-conscious measures only to remedy identified discrimination in particular sectors and industries within their jurisdictions, Congress may do so to "redress the effects of society-wide discrimination." [11]

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[10] *See Fullilove*, 448 U.S. at 505-06 (Powell, J., concurring) (past discrimination, which was not "identified with . . . exactitude," had effects that were being perpetuated by present procurement practices); *id.* at 520 (Marshall, J., concurring) ("present effects of past racial discrimination" continued to impair access of minority businesses to public contracting opportunities); *see also Croson*, 109 S. Ct. at 718 (plurality opinion) (Congress' action in *Fullilove* was predicated on belief that the "effects of past discrimination had impaired the competitive position of minority businesses").

[11] *Croson*, 109 S. Ct. at 719. This reaffirmation of *Fullilove* is not acknowledged by the Department of Justice. Nowhere does it come to grips with the fact that, unlike the City of Richmond,

While it may be true that in the short run the use of racial and ethnic preferences to remedy the effects of past society-wide discrimination "carries a danger of stigmatic harm," [12] in the long run minority preferences are designed in part to overcome stigma. Stigma is, after all, an intended product of discrimination: "[I]t is hardly consistent with the respect due to these States, to suppose that they regarded . . . as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation." *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393, 416 (1857).[13] Stigma continues to this day. In employing minority preferences, Congress has concluded that ultimately, stigma can only be overcome by more minorities performing in positions of consequence and thereby breaking down stereotypes and dispelling prejudices that were formed by stigma in the first place.

Congress may tackle society-wide discrimination through race-based measures. Instead, the Department of Justice injects the *Croson* limitations on state and local government action into this case and condemns Congress for failing to have identified discrimination with the degree of particularity that this Court required of the City of Richmond. The questions that the Department of Justice poses—whether there was any evidence of prior discrimination against minorities by the FCC or in the broadcasting industry—are the wrong ones to be asking here. *See* Brief of the United States as *Amicus Curiae* Supporting Petitioner at 20-21 [hereinafter "Brief of U.S."].

[12] *Croson*, 109 S. Ct. at 721. Here, though, there is very little danger of stigmatic harm, since minorities must meet basic financial qualifications and the other qualifications for a broadcast license are unrelated to "merit."

[13] *See also Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

2. *The Constitution gives Congress the unique power to address the consequences of society-wide discrimination*

Congress has unique power to remedy the consequences of society-wide discrimination, and its judgments about how to exercise that power are entitled to deference. Congress' special authority in matters of race derives, in large part, from the positive grant of legislative power that it enjoys pursuant to the Thirteenth, Fourteenth and Fifteenth Amendments, all of which were adopted during the post-Civil War Reconstruction era.[14]

As this Court stated in *Croson*, the Reconstruction era amendments "worked a dramatic change in the balance between congressional and state power over matters of race." [15] The amendments firmly established that Congress is the political institution uniquely competent to address society-wide problems related to racial discrimination, problems of national dimension. Having lived through the discord of the Civil War, the architects of the amendments were suspicious of local government when it came to race, and thus "limit[ed] the power of the states and enlarg[ed] the powers of Congress" so as to unify the nation again. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

Consequently, as this Court has recognized, "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guaran-

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[14] As Chief Justice Burger pointed out in *Fullilove*, Congress may also address the effects of society-wide discrimination under its Commerce and Spending Powers. *Fullilove*, 448 U.S. at 475-76.

[15] *Croson*, 109 S. Ct. at 719. *See id.* at 736 (Scalia, J., concurring) (Congress' powers "concerning matters of race were explicitly enhanced by the Fourteenth Amendment"); *see also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (under Fifteenth Amendment Congress can compel states to take action to ensure guarantees of full citizenship).

tees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.). Congress' remedial power is not restricted to situations where state action has violated the Constitution. The enforcement provisions of the Reconstruction era amendments not only authorize Congress to ensure that states comply with the principles of equality, but also to "define situations . . . that threaten [those] principles . . . and to adopt prophylatic rules to deal with those situations." [16]

These prophylactic rules may be race-based. In *Fullilove*, Congress had determined that the existing government contract procurement system perpetuated the effects of past discrimination and denied minorities equality under the law. This Court held that Congress could pre-

[16] *Croson*, 109 S. Ct. at 719. *See Katzenbach v. Morgan*, 384 U.S. at 648-50; *see also City of Rome v. United States*, 446 U.S. 156, 177 (1980) (Congress could adopt rule barring certain state conduct with respect to voting as a means of promoting purposes of Fifteenth Amendment, even where state arguably had not violated the Amendment).

Nevertheless, the Department of Justice insists that "unlawful" state action must be implicated before Congress can legislate under section 5 of the Fourteenth Amendment, and from there argues that there is no such action here since broadcast licensing only involves the federal government, not the states. Brief of U.S. at 18 n.10. But even assuming that unlawful state action is required, the Department of Justice's argument is wrong, for it was states that perpetrated and tolerated much of the society-wide discrimination that is to be remedied here. In any event, the question of the existence of state action—lawful or unlawful—is academic. Congress clearly can address problems of race relations under the Thirteenth Amendment and the Commerce Clause, both of which apply to purely private as well as state action. *See Fullilove*, 448 U.S. at 475 (opinion of Burger, C.J.) (approving remedial legislation that affected private conduct under Congress' Commerce Power); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) (private discrimination subject to remedial legislation under section 2 of Thirteenth Amendment). Furthermore, Congress may be able to remedy private discrimination under section 5 of the Fourteenth Amendment. *See United States v. Guest*, 383 U.S. 745 (1966); *Katzenbach v. Morgan*, 384 U.S. at 652-53.

scribe a race-conscious remedy even absent proof of unlawful discrimination by the states.[17] In this case, as we will show in Part IB, the existing broadcast licensing system also perpetuates the effects of past society-wide discrimination. Here too, Congress has the power to use racial preferences to address the problem.

The shifting of power from the states to the national government after the Civil War embodied in part the republican political theory expounded by James Madison and others.[18] Madison feared that parochial interests and factionalism, particularly at the local level, would subvert the democratic process and the proper operation of government.[19] His solution was a national legislature that would rise above the fray of local factions and deliberate matters of national dimension. It would, of course, operate with checks and balances so as to limit the power of its own factions and even of its majority.[20] The House of Repre-

[17] *See Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.); *see also UJO v. Carey*, 430 U.S. at 155 (Congress could require states to act on the basis of race to secure Fifteenth Amendment guarantees).

[18] *See* L. Tribe, *American Constitutional Law* 2-7 (2d ed. 1988) (Reconstruction era amendments reflected Madison's theory that national government would be more likely to protect individual liberties than local government); Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 508-09 (1989) (Reconstruction era amendments, which "gave a new primacy to our national institutions" at the expense of local ones, carried out intention of republican political theorists); *see also Croson*, 109 S. Ct. at 736 (Scalia, J., concurring) ("[a] sound distinction between federal and state (or local) action based on race rests not only on the substance of the Civil War Amendments, but upon social reality and governmental theory").

[19] The Federalist No. 10, at 77-78 (J. Madison) (C. Rossiter ed. 1961). *See also* R. Dahl, *Democracy and Its Critics* 218 (1989); Sunstein, *Interest Groups In American Public Law*, 38 Stan. L. Rev. 29, 39-45 (1985).

[20] *See* The Federalist No. 10, at 82-83; The Federalist No. 51, at 322-23 (J. Madison) (C. Rossiter ed. 1961).

sentatives and the Senate would act as checks on each other; together, they would "discern the true interests of the[] country," and promulgate legislation expressing the national will without sacrificing justice to "temporary or partial considerations." [21]

Over the past three decades, Congress has identified a national interest—indeed a commitment—in eradicating discrimination and its effects. Through a wide array of legislation, it has acted to fulfill that commitment.[22] The

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[21] The Federalist No. 10, at 82. *See also Brown v. Hartlage*, 456 U.S. 45, 56 n.7 (1982) ("[i]n the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good") (quoting The Federalist No. 51, at 325). In *Croson*, Justice Scalia stressed that it is consistent with the republican vision of government to trust Congress on matters of race. He explained:

> [R]acial discrimination against any group finds more ready expression at the state and local level than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very begining of our national history.

109 S. Ct. at 737 (Scalia, J., concurring).

[22] *See, e.g.*, Civil Rights of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified at 5 U.S.C. § 535(19) *et seq.*); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a *et seq.*); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 18 U.S.C. §§ 231 *et seq.*); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000 *et seq.*); Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641; Emergency School Aid Act of 1978, Pub. L. No. 95-561, 92 Stat. 2252 (codified at 20 U.S.C. § 3191-3207); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971 *et seq.*); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132; Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102

minority preference policy at issue in this case is part of this overall effort.

B. Congress Had Sufficient Factual Support for the Minority Preference Policy

This Court has made it clear that race-based remedial action must have sufficient factual support. In this case that requirement is satisfied, as Congress had ample basis to believe that historical patterns of discrimination have resulted in an almost complete absence of minorities as owners of broadcast licenses.

Although judicial review of the factual support for race-based action must always be searching, where Congress has acted appropriate deference is in order,[23] even when fundamental rights are at stake.[24] While Congress may not simply presume that society-wide discrimination has had effects that need to be remedied, the facts on which Congress predicates its action need not be found with the same specificity and precision that this Court demands of states and cities, and need not be compiled in formal findings.[25] Moreover, when considering the record underly-

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Stat. 1619; *see also* 42 U.S.C. § 1981; 42 U.S.C. § 1982; 42 U.S.C. § 1983.

[23] Mindful that an act of Congress was at issue in *Fullilove*, Chief Justice Burger acknowledged that this Court was assuming "the gravest and most delicate duty that [it] is called on to perform," *Fullilove*, 448 U.S. at 472 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)), and he called for "appropriate deference." *Id.* at 472. *See also Morrison v. Olson*, 108 S. Ct. 2597, 2626 (1988) (Scalia, J., dissenting) (the "harmonious functioning of the [political] system demands that [this Court] ordinarily give some deference, or a presumption of validity" to federal legislation).

[24] *See CBS v. Democratic Nat'l Comm.*, 412 U.S. at 102 (Court must approach its review of First Amendment challenge to congressional action with "great delicacy"). *Cf. Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (Court generally presumes that overriding national interest will justify discriminatory rule that is "expressly mandated by the Congress or the President").

[25] *See Fullilove*, 448 U.S. at 502 (Powell, J., concurring) (Congress' role as promulgator of "national rules for the governance of

ing any federal statute, this Court looks beyond the formal legislative history, taking into account all relevant information that was at Congress' disposal when it acted.[26]

This approach is particularly appropriate here, since Congress was not operating on a blank slate. It has legislated repeatedly in the area of race relations and "made national findings that there has been societal discrimination in a host of fields." *Croson*, 109 S. Ct. at 727. Beginning with the Civil Rights Act of 1957, which created both the United States Civil Rights Commission and the Civil Rights Division of the Department of Justice, and continuing to the present, Congress has passed significant legislation addressing the problems of racial discrimination that have affected the country.[27] This legislation is routinely the subject of oversight hearings and is regularly amended better to achieve its purposes.[28] This long, difficult, and frustrating process has made Congress aware of what has worked, what has not worked, and what needs to be tried. It has acquainted Congress with those areas of our society that are especially unaffected by mere antidiscrimination measures. It should be unnecessary for Congress to redocument the fact and history of discrimination every time it contemplates enacting another law.[29]

Congress' experience in addressing the problems of racial discrimination was complemented in this case by its familiarity with the workings of the broadcasting industry. When it directed the FCC to continue implementing the minority preference policy in comparative proceedings, Congress already knew that most of the licenses were initially awarded—at bargain basement rates—at a time when minorities were effectively excluded from the bidders' table by discrimination that was pervasive and officially sanctioned in many parts of the country.[30] It already knew that today the central barrier to enter broadcasting is an economic one, the need for substantial risk capital. It already knew that this barrier has had a disproportionate impact on minorities largely attributable to society-wide discrimination. And, Congress also knew that because the broadcasting industry is a mature one, and the frequency spectrum already well saturated, the most inexpensive way to acquire a license is through the comparative hearing process.[31]

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our society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding"); *id.* at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings"); *cf. Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part) (compared to local legislatures, "Congress may paint with a much broader brush").

[26] *Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (Congress' "special attribute lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue").

[27] *See supra* note 22.

[28] *See, e.g.*, Equal Opportunity Act of 1972, *supra* note 22 (extending reach of Title VII of 1964 Civil Rights Act); Voting Rights Act Amendments of 1982, *supra* note 22 (extending reach of Voting Rights Act of 1965); Fair Housing Act Amendments of 1988, *supra* note 22 (extending reach of Fair Housing Act of 1968).

[29] *See Fullilove*, 448 U.S. at 503 (Powell, J., concurring) (in light of the "information and expertise that [it has] acquire[d] in the consideration and enactment of earlier legislation," Congress should not be required "to make specific factual findings with respect to each legislative action" it takes in the area).

[30] *See Bakke*, 438 U.S. at 393-94 (opinion of Marshall, J.) (in all walks of life, "[t]he enforced segregation of the races continued into the middle of the 20th century" and was not "limited solely to the Southern States").

[31] The Department of Justice asserts that approximately 9% of all existing broadcast licenses change hands in any given year. Brief of U.S. at 21 n.12. But unlike at the outset of FCC licensing, radio and television stations today are not being given away for almost nothing; they are sold at significant premiums that derive from the increased value of broadcast stations over time. Having been excluded from the market when licenses were virtually free,

Viewed against that backdrop, the minority preference in comparative proceedings has sufficient factual support. To ignore Congress' substantial experience in confronting the consequences of racial discrimination and in deciding how best to allocate broadcast licenses is to "blind [oneself] to the realities familiar to the legislators." *Katzenbach v. Morgan*, 384 U.S. at 653.[32]

II. THE INTEREST IN PROMOTING DIVERSITY OF PERSPECTIVES IN BROADCASTING FURTHER SUPPORTS THE USE OF MINORITY PREFERENCES IN LICENSING

While Congress has a strong interest in remedying society-wide discrimination for its own sake, there is even a stronger public interest in remedial action that simultaneously serves other important goals. In this case, Congress determined that society-wide discrimination not only has resulted in the virtual absence of minority license owners in the broadcast industry, but that this in turn has had a significant deleterious effect on the diversity of perspectives reflected in broadcasting. The minority preference policy thus serves both the purely "backward-looking" in-

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and stations were built at cost, minorities are now being shut out because price tags are prohibitive. The minority preference policy applies only to the allocation of new licenses for new stations, not the licenses for existing stations that are being transferred at exorbitant rates each year. As such, the policy enables minorities to break into the industry on terms comparable to those on which nonminorities entered when broadcast licensing first began.

[32] The Department of Justice contends that the 1982 amendments to the Communications Act, which authorized the FCC to grant a preference to minorities in the random award of licenses through lotteries, have no bearing on the similar preference granted in comparative proceedings. Brief of U.S. at 19 n.11. Yet the very legislative history of the 1982 amendments that the Department of Justice cites refers back to the reports and studies on which the FCC initially predicated the comparative proceeding preference. *See* Pub. L. No. 97-259, 96 Stat. 1087, 1094 (1982) (codified at 47 U.S.C. § 309(i)(3)(A)); H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43-45 (1982).

terest of remedying past wrongs and the "forward-looking" interest of promoting diversity in broadcasting. This diversity interest is substantial and further supports the policy.

A. Forward-Looking Interests May Support the Use of Racial Preferences

This Court repeatedly has stated that the use of racial preferences may be justified only by a weighty governmental interest.[33] As the Court's previous decisions indicate, in most cases that interest will be a purely remedial one. However, there is no reason that a forward-looking interest cannot suffice, and the Court has never so held.[34]

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[33] Although that interest must be "compelling" in the case of a state or local government program, *see Croson*, 109 S. Ct. at 721, the precise standard applicable to a congressional program is not clear. In *Fullilove*, Justice Marshall (joined by Justices Brennan and Blackmun) stated that this interest must be "important," 448 U.S. at 519, Justice Powell used "compelling," *id.* at 496, and Chief Justice Burger's plurality opinion stated that the objective served by the program need only be "within the powers of Congress." *Id.* at 473.

[34] There is language in *Croson* that could be interpreted as limiting the use of racial preferences to remedial contexts. *See Croson*, 109 S. Ct. at 721 ("[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility"). However, because the racial preference at issue in *Croson* was defended only on remedial grounds, the Court had no occasion to and did not decide whether forward-looking justifications might have sufficed. Moreover, construing *Croson* to preclude forward-looking justifications is at odds with Justice O'Connor's acknowledgement that interests other than remedying past discrimination might be sufficiently important to support race-conscious action. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

To the contrary, several Justices have acknowledged that the use of racial preferences might be supported by an important governmental interest other than remedying discrimination.[35] These Justices recognized that in some contexts race-conscious action fosters values other than compensating minorities for past discrimination, and can "produce tangible . . . future benefits." *Croson*, 109 S. Ct. at 731 n.1 (Stevens, J., concurring).

This case involves another context in which race is relevant for reasons above and beyond remedying past discrimination. As explained in the following sections, the minority preference at issue serves the important forward-looking interest of promoting the diversity of perspectives reflected in broadcasting.

B. The Promotion of Diversity of Perspectives in Broadcasing Is a Substantial Interest

The promotion of diversity of viewpoints in broadcasting is a substantial governmental interest. It is central to the values embodied in the First Amendment, and has always guided the allocation of broadcast licenses.[36]

The goal of diversity in broadcasting is at least as important as the goal of diversity in higher education, which Justice Powell, writing in *Bakke*, found sufficiently

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[35] *See Bakke*, 438 U.S. at 311-15 (opinion of Powell, J.); *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *id.* at 313-14 (Stevens, J., dissenting); *Croson*, 109 S. Ct. at 730 & n.1 (Stevens, J., concurring); *cf. United States v. Paradise*, 480 U.S. 149, 167-68 n.18 (1987) (plurality opinion).

[36] The "public interest" standard that guides FCC decisionmaking "necessarily invites reference to First Amendment principles . . . and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978) (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 122 and *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

weighty to support race-conscious admissions policies in public universities. There, Justice Powell concluded that such action would further the strong First Amendment interest in promoting a diverse student body, which he reasoned would enhance a "robust exchange of ideas." 438 U.S. at 313. As important as this interest is, it has direct ramifications only for that portion of our population that attends college. In contrast, the mass media reach almost the entire population. For better or worse, radio and television have a "uniquely pervasive" influence on American life,[37] and play a critical role in educating the public and promoting the exchange of ideas. Therefore, Congress has good reasons for attempting to ensure that perspectives reflected through the broadcast media are not limited or distorted by the continuing effects of discrimination.

To the extent that there is any doubt about the importance of diversity in broadcasting, that doubt should be resolved in favor of the choice that Congress has made. While the Constitution may demand that courts conduct a searching inquiry to ensure that a racial preference is supported by a weighty goal, it does not authorize courts to substitute their own judgments for the considered and reasonable judgment of Congress. This is particularly true where, as here, Congress has acted in an area in which it has substantial power and expertise.

C. Congress Had Sufficient Basis to Link Diversity of Ownership With Diversity of Perspectives in Broadcasting

The dissent below argued that the minority preference policy does not support the goal of enhanced diversity in broadcast programming, because there was no "basis for believing that minority ownership would lead to 'minority programming' in some sense that is both intelligible and

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[37] *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989).

permissible."[38] This is incorrect and misses the point of the policy. Congress had every reason to believe that the minority preference policy would, in fact, expand the diversity of perspectives reflected in broadcasting, and not just in programming. For it is not only programming but also perspective—which includes considerations other than simply what show to run or song to play—that is at the crux of the policy.

When the minority preference policy was begun, broadcasting was basically an all-white industry, as it still is to a large extent today. This simple fact has had profound consequences for the diversity of perspectives reflected in broadcasting. The inclusion of minority owners clearly would enhance that diversity. It is not "stereotyping" to acknowledge that different racial and ethnic groups have unique perspectives that may be reflected in programming choices, selection of station managers, presentation of news, solicitation of advertisers, and community relations.[39] It is unrealistic to pretend otherwise. While in any particular case the proposition may prove false, in the aggregate the inclusion of minority owners has to make a difference.

The link between diversity in ownership and diversity in perspectives may not lend itself easily to empirical proof, but the Constitution requires only a close relationship between means and ends, not a guarantee.[40] This is

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[38] *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 358 (D.C. Cir. 1989) (Williams, J., dissenting), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990).

[39] *Cf.* T. Sowell, *The Economics and Politics of Race* 244 (1983) ("[t]he most obvious fact about the history of racial and ethnic groups is how different they have been—and still are . . .").

[40] In *Bakke*, Justice Powell did not require empirical proof that the admission of minority students to a medical school would in fact enhance the exchange of ideas or enrich the educational experience of the student body. For him, that common sense proposition was enough. He explained that "[a]n otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

particularly true when what is being reviewed is an act of Congress, which must make predictive judgments of the type at issue here all the time. The judicial task, therefore, should be to ensure that Congress had sufficient reason to believe that the racial preference would serve its purpose so that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 109 S. Ct. at 721. Here, Congress had ample reason to believe that including minority owners in the previously all-white broadcast industry would augment the diversity of viewpoints conveyed in broadcasting.[41]

III. THE MINORITY PREFERENCE POLICY SATISFIES ANY REASONABLE APPLICATION OF THE NARROWLY TAILORED TEST

Just as there should be deference to a determination by Congress that an important interest justifies the use of race-conscious measures, there should be deference to the means that Congress selects to serve that interest. For in both cases, Congress has special competence to act to

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[41] Congress did not rely on common sense alone. It had before it federal government findings on the consequences of having a mass media dominated by white ownership. *See* United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* 2 (1977) ("a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks"); *Kerner Commission Report*, *supra* note 7, at 203 ("The media report and write from the standpoint of a white man's world. . . . This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society").

remedy the consequences of discrimination in our society. Moreover, the choice of means is a peculiarly legislative function; while a court must review a race-conscious measure to ensure that it is narrowly tailored to meet its objective, the court should not substitute its judgment for the considered judgment of Congress. Indeed, this Court has stated: "We are mindful that '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.'" [42]

In this case, Congress' choice of means satisfies any reasonable application of the narrowly tailored test. Three general principles governing the narrowly tailored inquiry here deserve mention.

First, some burden on nonminorities is permissible. The dissent below, however, appears to endorse the "unique opportunity" approach taken by Judge Silberman in the *Shurberg* case, which also is currently before this Court.[43] Under that approach, it is unacceptable for a nonminority to be denied a particular license—a "unique opportunity

[42] *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) (quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949)). *See also Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.) ("stress[ing] the limited scope of the Court's [narrowly tailored] inquiry" in cases involving "the legislative authority of Congress"); *id.* at 515 n.14 (Powell, J., concurring) (narrowly tailored analysis "vari[es] with the nature and authority of [the] governmental body"). Notwithstanding these basic tenets, which figure prominently in the opinions of Chief Justice Burger and Justice Powell in *Fullilove*, the Department of Justice makes the bold assertion that "deference is not appropriate in deciding whether the particular remedy chosen by Congress is 'narrowly tailored' . . . ." Brief of U.S. at 15. What is most startling is that the Department of Justice claims that the opinions of Chief Justice Burger and Justice Powell support this proposition.

[43] *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 943 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 715 (1990).

to own a broadcasting station"—because of a minority preference given to a competitor. *Shurberg*, 876 F.2d at 917. Judge Silberman claimed that the minority preference at issue in *Shurberg* was unconstitutional because "[i]t is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race." *Id.* at 918. Similarly, the dissent below complained that "[h]ere, as in *Shurberg*, Metro was denied a comparative hearing on the only new license currently being offered in the Orlando area." *Winter Park*, 873 F.2d at 368 (Williams, J., dissenting).

This approach goes overboard in its attempt to protect the interests of nonminorities. In any case involving a minority preference, the plaintiff will always be able to claim that he did not get a particular thing that he wanted because of the preference. For example, some nonminority contractors undoubtedly lost out on contracts as a result of the minority preference program approved in *Fullilove*. But, as the Court declared in *Fullilove*: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." [44]

Here, the burden shared by nonminorities is acceptable. The minority preference is only one consideration in the comparative hearing process, and does not automatically preclude nonminorities from acquiring broadcast licenses. Moreover, a broadcast license does not have the sort of personal value that demands utmost protection. Unlike the layoffs of individual teachers at issue in *Wygant*, no one's likelihood is at stake. Nor does the minority pref-

[44] *Fullilove*, 448 U.S. at 484 (opinion of Burger, C.J.). *See also Wygant*, 476 U.S. at 280-81 (plurality opinion) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").

erence policy upset anybody's "firmly rooted expectation[s]," [45] since it affects only those who are competing for broadcast licenses, not those who already own them. Finally, ownership of a broadcast license has always been considered a privilege; Congress and the FCC may deny licenses or place restrictions on license owners as required by the public interest.[46] The failure to obtain such a privilege could hardly be deemed a substantial burden.

Second, the narrowly tailored test should not require that minority preferences benefit only minorities who are shown to be actual "victims" of discrimination.[47] Such a requirement would be illogical in a case such as this, where the minority preference serves a goal beyond remedying discrimination. But even where a minority preference is purely remedial, the "victims only" requirement conflicts with this Court's recognition that minority preferences need not be designed to remedy individual cases of discrimination. Justice O'Connor observed in *Wygant*:

> [T]he Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination . . . .[48]

As this statement acknowledges, and as Congress has recognized, group remedies can be appropriate because

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[45] *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

[46] *See generally Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-92 (1969).

[47] Some courts have imposed such a requirement. *See, e.g., Shurberg*, 876 F.2d at 912 (opinion of Silberman, J.); *Main Line Paving Co. v. Philadelphia Bd. of Educ.*, 725 F. Supp. 1349, 1361 (E.D. Pa. 1989); *see also Winter Park*, 873 F.2d at 368 (Williams, J., dissenting).

[48] *Wygant*, 476 U.S. at 287. *Cf. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986) (under Title VII, court-ordered race-conscious relief need not be limited to actual victims of discrimination).

racial and ethnic discrimination is designed to and has in fact oppressed and stigmatized groups. Decades of egregious discrimination against black people, for example, has affected all black people. When a black person benefits from a minority preference, black people as a group move one step closer to overcoming the effects of that discrimination. Requiring beneficiaries of minority preferences to prove that they personally have been victims of discrimination simply misses the point of what minority preferences are trying to remedy.

The argument that minority applicants for broadcast licenses are well-off and do not need preferences misses the mark for the same reason. As a group, minorities are still underrepresented in the pool of qualified applicants for broadcast licenses, as a result of discrimination. Congress determined that without preferences, some minority applicants will win licenses, but minorities as a group will still be greatly underrepresented among broadcast owners, and diversity will suffer. Only the extra push that a preference provides will make up the ground lost by past discrimination.

Third, Congress must have some discretion in its consideration of race-neutral alternatives. As we have argued, Congress has unique power and competence to remedy the consequences of society-wide discrimination, and to decide that race-conscious measures are appropriate. Of course, where the goals of a race-conscious measure clearly may be adequately served by race-neutral means, the race-conscious measure should not be preferred. But when the efficacy of race-neutral alternatives is not so clear, Congress should not be stripped of its discretion to choose how best to implement its remedial policies.[49] In such situations, Congress certainly should not be required to exhaust race-neutral alternatives before proceeding with race-conscious action; indeed, such a requirement

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[49] *See Fullilove*, 448 U.S. at 508 (Powell, J., concurring) (Congress should not be required to choose the least restrictive means of implementing its goals).

was not even imposed on state and local governments in *Croson*. *See* 109 S. Ct. at 728.

In this case, Congress reasonably determined that the minority preference in comparative proceedings was necessary. The policy was adopted only after ten years of unsuccessful regulatory efforts to rectify the acute underrepresentation of minority owners in broadcasting.[50] This informed judgment of Congress was reasonable. It is entitled to deference by this Court.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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March 6, 1990

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[50] *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 979-80 (1978). Because of First Amendment restrictions, direct regulation of programming content would be unconstitutional.

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No. 89-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
et al., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN JEWISH COMMITTEE, BLACK CITIZENS FOR A FAIR MEDIA, COMMUNICATIONS COMMITTEE OF THE CONNECTICUT CONFERENCE OF THE UNITED CHURCH OF CHRIST, DEPARTMENT OF COMMUNICATIONS OF THE CAPITOL REGION CONFERENCE OF CHURCHES, FIDELIA LANE, OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST, PEOPLE FOR THE AMERICAN WAY, THE REVEREND ALEXIS SIDORAK, STEPHEN SIDORAK, SHERMAN G. TARR, TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, AND THE REVEREND MARK WELCH

As **Amici Curiae** In Support of Respondent[1]

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The letters of consent have been filed separately with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amici represent viewers and listeners of radio and television from a variety of racial, ethnic and religious backgrounds. As consumers of broadcast programming, *amici* are vitally interested in the Federal Communications Commission's ("FCC" or "Commission") minority enhancement policy because it increases the diversity of viewpoints presented on television and radio.

The American Jewish Committee, founded in 1906 to protect the civil and religious rights of Jews, is an organization of 40,000 Jews who are committed to "liberty and justice for all." Black Citizens for a Fair Media, established in 1971, is a citizens' group which includes representatives from over 250 community organizations. The Office of Communication ("OC/UCC") is an instrumentality of the United Church of Christ, a Protestant denomination of 1.65 million members nationwide. OC/UCC has consistently supported diversity of viewpoint in the marketplace of ideas in the course of its twenty-five year history as a public interest advocate. People for the American Way is a 285,000 member, non-partisan citizens' organization established in 1980 by a group of religious, civic, and educational leaders to promote and protect civil and constitutional rights, including first amendment freedoms, and to promote tolerance of our nation's pluralism and diversity. Telecommunications Research and Action Center is a Washington D.C. based, not for profit, public interest group committed to encouraging diversity in the broadcast industry.

The Communications Committee of the Connecticut Conference of the United Church of Christ; the Department of Communications of the Capitol Region Conference of Churches; Fidelia Lane; The Reverend Alexis Sidorak; Stephen Sidorak; Sherman G. Tarr; and The Reverend Mark Welch are representatives of significant segments of the viewing public in the Hartford, Connecticut area. These individuals and organizations have been, or are, successors in interest to

participants in the litigation pertaining to the license for Channel 18 in Hartford, Connecticut.[2]

SUMMARY OF ARGUMENT

The FCC policy of considering minority ownership and management as one "plus factor" in multi-factor broadcast license proceedings is designed to serve the recognized governmental interest of promoting broadcast viewpoint diversity. This Court has explicitly recognized the importance of achieving the widest possible dissemination of information from diverse and antagonistic sources, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978), and promoting the presentation by broadcasters of "those views and voices which are representative of their community." *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The FCC's interest in promoting diversity is compelling, particularly in light of the significant influence of the broadcast media, the nature of the FCC licensing process, and the underrepresentation of minorities in broadcasting. The objective of promoting racial diversity in broadcasting is similar to the interest in promoting racial diversity in education recognized by members of this Court in previous cases, and will further the interests of *all* viewers and listeners, such as *amici* and their members.

The FCC policy is also narrowly tailored to achieve its objective of promoting racial diversity. As FCC experience has demonstrated, non-racial means have failed to serve these interests. Moreover, the FCC has implemented its policy on a flexible, individualized basis so that enhancements are provided only where they will serve the governmental interest. Contrary

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[2] That litigation is now before this Court. *Astroline Communications Co. Ltd. v. Shurberg Broadcasting of Hartford, Inc.*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, No. 89-700 (Jan. 8, 1990). As parties to that proceeding before the agency, and as *amici curiae* in the Court of Appeals in that matter, they, along with the other *amici*, have supported not only the FCC's distress sale policy, but also its policy promoting minority and female ownership in comparative hearings.

to Petitioner's claim that minority status is generally dispositive, claims based on minority status can be, and routinely are, rebutted on a case-by-case basis. No licenses are set aside for any group, no one is excluded from applying for any license based upon race, and minority ownership and management is but one factor in a complex, multi-factor proceeding. The policy is limited in duration and has only a diffuse impact on non-minorities.

Although the FCC minority enhancement policy would thus pass constitutional muster under even the most exacting scrutiny applied by this Court, *amici* disagree with Petitioner's assertion that strict scrutiny is applicable in this case. The FCC policy clearly implicates Congress' power under section five of the fourteenth amendment, and it would be improper for this or any other court to subject this policy to the same strict scrutiny which is applied to state and local measures. Accordingly, it is all the more clear that the FCC policy should be sustained by this Court.[3]

I. FCC MINORITY ENHANCEMENT POLICIES SERVE THE COMPELLING GOVERNMENT INTEREST IN PROMOTING DIVERSITY

Through the use of the minority enhancement policy in comparative licensing hearings, the FCC aims to achieve a marketplace of ideas and viewpoints that reflects the diversity of backgrounds and experiences of the nation's population. This policy is important for all viewers and listeners. As the FCC has

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[3] This brief addresses only the constitutionality of the minority enhancement policy and does not analyze the separate question of the constitutionality of the enhancement awarded to female owners who propose to be integrated in station management. While *amici* support the female enhancement policy, the Court need not reach this issue in light of the fact that female ownership played virtually no role in the FCC decision under review. *See Winter Park Communications*, 3 FCC Rcd 866, 867 (1988). Should the court reach this issue, however, we urge that it find the policy constitutional. If, as *amici*, argue, the minority enhancement policy can withstand strict scrutiny, the female enhancement policy should be able to withstand the lesser review applied to distinctions based on gender. *See Craig v. Boren*, 429 U.S. 190 (1976).

concluded, the continuing lack of minority participation "is detrimental not only to the minority audience but to all the viewing and listening public." *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (hereinafter *1978 Policy Statement*).[4]

This commitment to diverse ownership and programming is essential to the preservation of first amendment freedoms. The central purpose of the first amendment is to provide "an uninhibited marketplace of ideas in which the truth will ultimately prevail." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969). This marketplace is vital because maintaining an informed electorate is basic to the functioning of a democracy. *Id.* The best way to guarantee this right is to insure that information suppliers (owners and operators of broadcast facilities) represent diverse elements in society.

The FCC has concluded that encouraging minority ownership and management is an essential component of this broad effort to assure diversity.[5] Since, as of 1981, less than two percent of

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[4] *See also Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Judge Williams' opinion evidences a misunderstanding of the primary purpose of the minority enhancement policy when he describes the policy as having "the purpose of generating programs 'targeted' at specific ethnic groups." *Id.* at 357. *See also* Brief of United States as *amicus curiae* at 25 (asserting same misunderstanding).

[5] Both the Petitioner and the United States as *amicus curiae* claim that licensees who benefit from the minority enhancement will suffer from stigmatic harm. This view arises from a belief that minorities are inferior as applicants and can only prevail in a comparative hearing with the assistance of the minority enhancement. *See* Brief of Petitioner at 38; Brief of United States as *amicus curiae* at 8. However, this concern over a stigmatic harm evidences a misunderstanding of the comparative hearing process and of the minority enhancement. There is a threshold requirement in the comparative process that all prospective licensees be qualified to operate broadcast stations. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965); *1978 Policy Statement*, 68 F.C.C.2d 979 (1978). After the FCC finds an applicant to be qualified, the FCC compares all qualified applicants to determine which applicant would *best* serve the public interest. Pursuant to the individualized case-by-case process described

continued

commercial broadcast stations were minority owned, H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 43 (1982) (*reprinted in* 1982 U.S. Code Cong. Ad. News 2287), this conclusion is eminently reasonable. Thus, the minority preference policy, although influencing the award of relatively few licenses, nonetheless forms a vital part of the FCC's licensing scheme.

A. The Media's Influence on the Public and the Nature of the FCC's Licensing Process Makes Achieving Viewpoint Diversity a Compelling Governmental Interest

The power and influence of the broadcast media over the lives of Americans simply cannot be overstated. Aside from work and sleep, television viewing is the primary activity of most Americans. G. Comstock, S. Chaffee, N. Katzman, M. McCombs, D. Roberts, *Television and Human Behavior* 10 (1978). The average American spends over seven hours daily listening to radio and/or watching television. *Broadcasting/Cablecasting Yearbook* A-2 (1988). Access to broadcast media is almost universal in this country,[6] and many Americans rely more heavily on broadcasting than on newspapers as their primary news source.[7]

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in Section II(B) below, the FCC may consider an applicant's minority status to be a factor which enhances its qualifications to operate a station because it is likely to present viewpoints that are currently underrepresented in the broadcast media. Thus, in the rare circumstance in which two applicants are equal in all respects except for the fact that one has minority owner/managers and the other does not, the FCC recognizes the minority applicant as being better qualified. No stigmatic harm should attach under a system in which a minority may prevail as a result of being the better qualified applicant.

[6] In 1989 more Americans than ever before had access to radio and television. More than 98% of American households had a television set and more than 99% of American households had a radio. *Broadcasting/Cablecasting Yearbook* G-16 (1989).

[7] The latest study by the Roper Organization shows that 66% of the United States public turns to television as the source of most of its news and that 55% rank it as the most reliable news source. *Broadcasting/Cablecasting Yearbook* A-2 (1988).

Because television and radio cannot tell or show their audience everything that is happening in the world, the editors, who determine what information to broadcast, play a subtle but influential role in their audience's lives. Broadcasters have the power to shape what people see by the use of editorial judgments.

This influence of broadcasting over public opinion underscores the importance of this country's broadcast licensing scheme, which mandates that licensees serve the "public interest." 47 U.S.C. § 309(a) (1982). As this Court specifically recognized in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), ""[t]he public interest" standard necessarily invites reference to first amendment principles,' and in particular to the first amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* at 795 (*quoting CBS v. Democratic National Committee*, 412 U.S. 94, 122 (1973); *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). It is precisely the objective of exposing the public to a wide variety of diverse viewpoints which the FCC's minority preference policy seeks to achieve by promoting diversity in ownership and operation of broadcast facilities. Given the power of the media to influence the public's perception of the world and the lack of minority participation, that interest is all the more compelling. Indeed, the Communications Act conferred broad authority upon the FCC to carry out the "obligation ... to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976) (*citing Office of Communication of United Church of Christ v. FCC*, 359 F.2d 944 (D.C.Cir. 1966)).[8]

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[8] The Acting Solicitor General incorrectly cites *NAACP v. FPC*, 425 U.S. 662, in his challenge to the proposition "that a federal administrative agency, acting under a general grant of authority to regulate a particular industry in the public interest, should be entitled to any special deference . . . ." *Brief* for the United States as *amicus curiae* at 14. In fact, in *NAACP v. FPC*, this Court indicated that, while the Federal Power Commission had no such authority, the Communications Act did, indeed, confer such power upon the FCC in fulfillment of its responsibilities to insure diverse programming.

The conclusion that promoting diversity in broadcast ownership and operation is a compelling interest is reinforced by the nature of the FCC licensing process. In comparative broadcast hearings, the FCC is faced with the dual tasks of providing "the best practicable service to the public and . . . a maximum diffusion of control of the media of mass communications." *1965 Policy Statement*, 1 F.C.C.2d at 394.

Those who do receive broadcast licenses are granted a temporary privilege, rather than ownership of the frequencies. 47 U.S.C. § 301 (1982). However, as a practical matter, licensees are routinely granted renewals of their licenses as long as they serve the public interest. Because the number of applicants exceeds the number of available licenses, this Court has stated that "those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of their communities.'" *League of Women Voters of California*, 468 U.S. at 377 (*quoting Red Lion*, 395 U.S. at 389). At the same time, however, broadcasters also have considerable latitude in the use of their licenses. *See CBS v. FCC*, 453 U.S. 367, 395 (1981) (*quoting CBS v. DNC*, 412 U.S. at 110). The FCC has recognized that license "'ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of [broadcast] presentation.'" *FCC v. NCCB*, 436 U.S. at 785 (*quoting Rules Relating to Multiple Ownership of Standard, FM, and Television Stations, Second Report and Order*, 50 F.C.C.2d 1046, 1050 (1975)).

Thus, although broadcasters enjoy wide editorial freedom under the first amendment, the public also has a first amendment right to receive the widest possible dissemination of information. When these two interests clash, a sensitive accommodation is required.

Precisely because of the editorial freedom of licensees and because of the profound influence they exert over public opinion, the FCC has a compelling interest in assuring that broadcast ownership is widely dispersed. Only through regulation of ownership can the FCC assure the kind of diversity vital to the democratic process without interfering with broadcasters' equally vital constitutional right of editorial freedom. The FCC's minority enhancement policy is best understood as a careful effort to

maintain this delicate balance. Here, as in other contexts, "Congress and [the FCC] have established a delicately balanced system of regulation intended to serve the interests of all concerned," and "[the Court] must afford great weight to the decisions of Congress and the experience of the Commission." *CBS v. DNC*, 412 U.S. at 102.

B. The Minority Enhancement Policy Is Supported by the Diversity Rationale of Justice Powell's Opinion in *Bakke* and Is Different from the Racial Preference Scheme Invalidated in Croson

The minority enhancement policy is very similar to the university admissions plan approved by a majority of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and discussed in Justice Powell's opinion announcing the Court's judgment. Justice Powell reasoned that a state university's goal of providing a diverse student body was supported by the first amendment because diversity promotes the widest dissemination of ideas and viewpoints. Therefore, race can be used as a factor in admissions because minorities would not otherwise bring "to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." *Bakke*, 438 U.S. at 323.

The goal of achieving broadcast diversity is closely analogous to that of achieving educational diversity. Justice Powell viewed academic freedom as a first amendment concern that entitles a university to promote the goal of attaining a diverse student body that fosters an "atmosphere which is conducive to speculation, experimentation and creation — so essential to the quality of higher education." *Bakke*, 438 U.S. at 312. Similarly, the FCC bases the minority enhancement policy on the premise that the public has a first amendment right to receive information from diverse and antagonistic sources. The government's interest in guaranteeing access to a wide variety of broadcast viewpoints and opinions is at least as compelling as its interest in creating a diverse student body at a public university.

The minority enhancement policy is clearly distinguishable from racial preference programs invalidated by this Court. In *City*

of Richmond v. J.A. Croson, 488 U.S.___, 109 S.Ct. 706 (1989), this Court declared unconstitutional a set-aside plan that required at least thirty percent of each city construction contract to be awarded to "Minority Business Enterprises." This plan was fundamentally different from the FCC's minority enhancement policy. No one could plausibly argue that bridges and roads built by minority contractors are different from, or better than, those built by the winner of a competitive bidding procedure. In contrast, the entire viewing and listening public is the primary beneficiary of the FCC's minority enhancement. The broadcasting choices of minority broadcast managers *are* different from those of their majority counterparts and afford the public benefits by exposure to these diverse views. *See Report of the National Advisory Commission on Civil Disorders* 203 (1968) (*Kerner Commission Report*).[9]

II. THE FCC'S POLICY IS NARROWLY TAILORED TO ACHIEVE PROGRAM DIVERSITY

Under strict scrutiny analysis, race-conscious measures must be narrowly tailored to achieve their goals. *See Croson*, 109 S.Ct. 706; *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Such measures need not, however, be limited to the least restrictive means of implementation. *Fullilove*, 448 U.S. at 506 n.8 (Powell, J., concurring). Moreover, "[i]n no matter should . . . [this Court] pay more deference to the opinion of Congress than

[9] By the same token, the interest promoted by the FCC policy is substantially different from the rationale for the lay-off policy invalidated by this Court in *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986). Unlike the Jackson Board's lay-off scheme, the FCC policy is not intended to remedy general societal discrimination or to provide "role models" for minorities. *Cf. Wygant*, 476 U.S. at 275-276 (opinion of Powell, J.); *id.* at 286-288 (Opinion of O'Connor, J.). Instead, it is intended to serve the very different goal of promoting racial diversity in broadcasting for the sake of *all* viewers and listeners. *Id.* at 288 n. *. As Justice O'Connor explicitly recognized in the context of education, a government interest in "the promotion of racial diversity has been found sufficiently 'compelling' . . . . to support the use of racial considerations in furthering that interest." *Id.* at 286.

in the choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480 (*quoting National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949)). With their special responsibility and competence in broadcast regulation, Congress and the FCC, are in the best position to judge whether an alternative remedy would have been effective in promoting diversity of viewpoints, and to assess whether or not a particular race-conscious program is appropriate. *Cf. Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring).

In determining the constitutionality of the means selected, this Court has examined a variety of factors. These include the efficacy of alternative measures, the existence (where relevant) of waiver provisions, the duration of the measure, and the impact of the measure on third parties.[10] *See Paradise*, 480 U.S. at 171; *Fullilove*, 448 U.S. at 511-16 (Powell, J., concurring); *see also Wygant*, 476 U.S. at 280-281; *id.* at 293-294 (O'Connor, J., concurring). The FCC policy in this case clearly satisfies all these criteria.

[10] This Court has identified an additional criterion, the relationship of any numerical requirements to the available minority members in the appropriate market. *See United States v. Paradise*, 480 U.S. 149, 171 (1987). This criterion does not apply in this context because the FCC's minority enhancement policy, unlike the set-asides involved in *Croson*, *Fullilove*, and *Bakke*, reserves no quotas or fixed percentages of licenses for minorities. The FCC's award of minority enhancement credits "is not a grant of any given number of permits to minorities or a denial to qualified nonminorities of the ability freely to compete for permits; it is instead a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters." *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 613 (D.C. Cir. 1984) (emphasis in the original). In this respect, the FCC policy is similar to the practice approved under Title VII in *Johnson v. Transportation Agency, Santa Clara County, CA.*, 480 U.S. 616 (1987), in which race was merely one "plus factor" in a multi-factor promotion selection system.

A. Alternative Measures Have Failed To Increase the Number of Minority Voices

In upholding the preference plan in *Fullilove*, three members of this Court noted that, before adopting the set-asides, Congress had considered and attempted alternatives that were not based on racial criteria. *See Fullilove*, 448 U.S. at 463-67; *id.* at 511 (Powell, J., concurring). In addition, a majority of this Court in *Croson* stated that before a racial preference can be employed, there must have been "consideration of the use of race-neutral means to increase minority business participation." *Croson*, 109 S.Ct. at 728; *see also Paradise*, 480 U.S. at 171. Here, there has been more than mere "consideration" of race-neutral alternatives by the FCC.[11] *See generally* Brief of FCC in *Astroline*, No. 89-700, at 38-42.

The FCC has a long history of applying race-neutral alternatives designed specifically to achieve diversity of viewpoints. As an example, for many years the Commission's "ascertainment rules" required licensees to contact community leaders and members of the general public to obtain information about community interests and to present programming responsive to those interests. *See, e.g., Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d

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[11] It is important to keep in mind that the FCC cannot be required to exhaust every imaginable alternative. What Justice Scalia recently noted in the context of commercial speech is also appropriate here:

> What our decisions require is a "fit between the legislature's ends and the means chosen to accomplish those ends,". . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served,". . . that employs not necessarily the least restrictive means but, as we have put in other contexts . . . a means narrowly tailored to achieve the desired objective. *Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.*

Board of Trustees of State University of New York v. Fox, 492 U.S. ___, 57 U.S.L.W. 5015, 5018 (1989) (emphasis added).

650 (1971); *Ascertainment of Community Problems by Applicants*, 57 F.C.C.2d 418 (1976). The Commission included minority and ethnic groups as a significant segment of the community whose views were to be ascertained. 57 F.C.C.2d at 419, 447. Subsequently, however, the Commission found that,

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations . . . we are compelled to observe that views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public.

1978 Policy Statement, 68 F.C.C.2d at 980-981 (citations omitted). Only after the ascertainment policy proved inadequate did the Commission adopt the tax certificate, distress sale, and minority enhancement policies.

Another example of the Commission's use of race-neutral alternatives are the multiple ownership rules that limit the number of broadcast outlets that can be owned. *See* 47 C.F.R. § 73.3555 (1988). These rules are designed "to encourage diversity in the ownership of broadcast stations so as to foster viewpoint diversity." *Amendment of Section 73.3555*, 4 FCC Rcd 1741, 1743 (1989). While some of these rules were instituted well before the minority ownership policies, they nonetheless have resulted in no appreciable increase in the number of minority owners of radio or television licenses.[12]

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[12] Moreover, the FCC has considered and rejected the use of race-neutral alternatives that focus on reviewing the program content of all broadcasters to determine their sensitivity to minority views as raising serious first amendment problems. As discussed below, *see supra* section II(B), the use of structural methods, such as the minority enhancement policy, is an attempt by the FCC to avoid government intrusion into regulation of program content.

Relying on such past experiences, the FCC, and subsequently Congress,[13] concluded that resort to race-conscious means was necessary. *Cf. Fullilove*, 448 U.S. at 463-467; *see also id.* at 511 (Powell, J., concurring). Such a considered judgment is entitled to substantial deference by this Court, particularly in light of the careful methods by which the FCC policies are implemented.

B. The Minority Enhancement Policy Is Applied in a Flexible, Case-by-Case Manner

In *Croson*, this Court found that policies which apply a case-by-case approach "are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration." *Croson*, 109 S.Ct. at 728-29; *see also Fullilove*, 448 U.S. at 486-87. The FCC's comparative hearing process entails thorough case-by-case scrutiny of each application; no applicant is excluded from consideration because of race; and the enhancement credit "may be rebutted in the administrative process." *Fullilove*, 448 U.S. at 487.

The Commission weighs a variety of factors in determining which applicant should receive the award. *See 1965 Policy Statement*, 1 F.C.C.2d at 394-99. The Commission characterizes diversification of control of the media as of "primary significance."

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[13] When Congress passed legislation in 1982 authorizing the use of lotteries in lieu of comparative hearings, it specifically mandated that significant preferences for minority applicants be employed where a lottery is used. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95, codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii). More recently Congress enacted into law, by way of the 1987 Continuing Resolution, the FCC's comparative minority preference policy. *See* Continuing Appropriations For Fiscal Year 1988, Pub.L. 100-202, 101 Stat. 1329 (1987). Analogous provisions have been enacted for subsequent fiscal years. *See* Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

Id. at 394. Thus, applicants owning no interests in existing media concerns are given a preference over applicants with such interests. *See Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and Television Stations By Random Selection (Lottery)*, 4 FCC Rcd 2246, 2258 (1989) (hereinafter *Lottery Rulemaking*).

The *1965 Policy Statement* identified the second factor, integration of ownership in the day-to-day management of the broadcasting station, as having "substantial importance." *1965 Policy Statement*, 1 F.C.C.2d at 395.[14] Comparative analysis under management integration involves a two-step approach. First, the Administrative Law Judge (ALJ) determines, on a *quantitative* basis, the extent to which the owners propose to work in management positions such as general manager, station manager, program director, or sales manager, at the station. If there is no significant quantitative difference, the ALJ will award enhancements for integrated owners who demonstrate *qualitative* superiority because they: (1) reside or propose to reside in the station's community of license; (2) are minority; (3) are female; (4) participate in civic activities; and (5) possess past broadcast experience. *Lottery Rulemaking*, 4 FCC Rcd at 2259.

Based on these criteria, the ALJ awards enhancements that range from "overwhelming" to "very slight." *Id.* The ALJ then compares the applicants to each other and selects an overall winner. Because of the myriad of factors involved and the fine gradations of weight accorded to each of these factors, a single criterion is rarely outcome determinative.

The minority enhancement becomes relevant *only* after the Commission determines that there are no significant differences in the competing applicants' management integration proposals. *See WHW Enterprises, Inc.*, 89 F.C.C.2d 799, 817 (Rev. Bd. 1982), *review denied*, FCC 83-368 (Sept. 15, 1983), *aff'd in part and rev'd in part on other grounds*, 753 F.2d 1132 (D.C. Cir.

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[14] Several other factors may also be taken into consideration. These include proposed program service, an applicant's past broadcast record, efficiency of frequency use, an applicant's character, and any other "relevant and substantial factors" specifically designated by the Commission. *See 1965 Policy Statement* at 394-99.

1985). Accordingly, an applicant with a clear advantage over another in its management integration proposal will always be preferred to a minority.

Even in cases where the minority enhancement policy applies, no applicants are excluded because of their race. Nor is an applicant automatically given a preference because of race. In order to receive any enhancement for minority ownership, the minority owner must work at the station in a position that significantly affects programming decisions or station management for a substantial number of hours per week.[15] For example, in *San Joaquin TV Improvement Corp.*, 96 F.C.C.2d 594, 599-600 (1983), *recon. denied*, 96 F.C.C.2d 617 (1984), no enhancement was awarded to a minority stockholder because his proposed position as general counsel for the station was found to have insufficient influence on program decisions.

Moreover, despite Metro's assertion to the contrary, the enhancement credit is not automatically determinative. *See* Brief of Petitioner at 22. Metro attempts to demonstrate that the enhancement is determinative as a practical matter by referring to seventy-eight recent FCC comparative licensing decisions. *Id.* at 23. Metro apparently reasoned that every time a minority applicant prevailed, it was because of the minority enhancement policy. Nothing could be further from the truth. A review of the decisions that Metro asserts were decided on the basis of the minority enhancement reveals that, in the overwhelming majority of them, factors other than the enhancement were determinative.[16]

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[15] No full-time management integration credit is given to an applicant who works less than 40 hours a week, and no part-time management integration credit is awarded to an applicant who works less than 20 hours per week. *See Midwest Broadcasting Company*, 70 F.C.C.2d 1489, 1495 (Rev. Bd. 1979).

[16] Of 78 recent comparative cases, Metro asserts that white males won 26; white females won 10; minorities and females won 42, *see* Brief of Petitioner at 23 n. 59. Our survey includes only the last category. Of these 42 cases in which Metro asserts that the minority enhancement was determinative, there were 33 in which the minority enhancement was clearly *not* determinative. Those 33 cases are: *Duane*

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Tomko, 2 FCC Rcd 206 (ALJ 1987) (determinative factor was 100% management integration credit); *Tulsa Broadcasting Group*, 2 FCC Rcd 1149 (ALJ 1987) (both finalists received minority enhancement, dispositive factor was that one applicant had prior broadcast experience while the other did not); *Magdalene Gunden Partnership*, 2 FCC Rcd 1223 (ALJ 1987) ("management integration preference [was the] . . . controlling factor in this case." *Id.* at 1238); *Dalton TV Associates Limited*, 2 FCC Rcd 2940 (ALJ 1987) (both applicants were minorities); *Armando Garcia*, 2 FCC Rcd 4166 (ALJ 1987) (sum total of Garcia's enhancements outweighed Reimer's enhancements); *Bogner Newton Corp.*, 2 FCC Rcd 4792 (ALJ 1987) ("The disparity between the [management] integration credit attributed to Mountain as opposed to NBC and any other applicants is such that no amount of enhancement could offset Mountain's integration superiority." *Id.* at 4805); *Washoe Shoshone Broadcasting*, 2 FCC Rcd 5362 (ALJ 1987) (several applicants received minority enhancement); *Hispanic Keys Broadcasting Corp.*, 2 FCC Rcd 6255 (ALJ 1987) (several applicants entitled to 100% minority enhancement; past residence and civic participation were decisive factors); *Religious Broadcasting Network*, 2 FCC Rcd 6561 (ALJ 1987) (winning applicant would have prevailed without the minority/female enhancement); *Northampton Media Associates*, 3 FCC Rcd 570 (ALJ 1988) (one applicant found to be a sham and thus received no integration credit; remaining applicant was entitled to a 65% integration credit and thus was awarded the license); *UN2JC Communications*, 3 FCC Rcd 2243 (ALJ 1988) (prevailing applicant won because of greater broadcast experience, better comparative coverage, and female status); *62 Broadcasting, Inc.*, 3 FCC Rcd 4429 (ALJ 1988) ("The dispositive factor was superiority under the comparative coverage criterion. 62 Broadcasting's provision of a first servi · (3,408 people) and a second service (810 people) warrants a clear and decisive comparative victory." *Id.* at 4450); *Marlin Broadcasting of Central Florida*, 3 FCC Rcd 4699 (ALJ 1988) (civic participation and past broadcast experience were the dispositive factors); *Key Broadcasting Corp.*, 3 FCC Rcd 6587 (ALJ 1988) (dispositive factor was that prevailing applicant had a 100% full-time management integration whereas next closest applicant had a 60% part-time and 40% full-time management integration credit); *DLBS Incorporated*, 3 FCC Rcd 6710 (ALJ 1988) (three finalists each entitled to 100% minority enhancement winner prevailed based on sum total of other enhancements); *Pontchartrain Broadcast Co.*, 3 FCC Rcd 6800 (ALJ 1988) (minority enhancement was not dispositive; prevailing applicant had overall superior integration proposal based on full-time commitment and local residence as well as minority status);

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The Baltimore Radio Show, 3 FCC Rcd 6823 (ALJ 1988) (as between final two applicants, "[b]oth receive[d] equal minority and female enhancement credit. . . . The critical difference was that" one applicant received civic participation enhancement credit and the other did not. *Id.* at 6828); *Ramon Rodriguez & Associates*, 4 FCC Rcd 370 (ALJ 1989) (each applicant received minority and female enhancement); *Beaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 581 (ALJ 1989) (prevailing applicant was entitled to credit for proposing that its full controlling interest would also manage the station on a day-to-day basis; this was the determinative factor as the "applicants [were] equal in all other comparisons." *Id.* at 585.); *Corydon Broadcasters Limited*, 4 FCC Rcd 1537 (ALJ 1989) (winning applicant entitled to 100% integration credit while loser not entitled to any integration credit; both applicants had minorities); *Coastal Broadcasting Partners*, 4 FCC Rcd 2345 (ALJ 1989) (each of five finalists were entitled to 100% enhancement for racial minority status; this factor was thus not dispositive); *Renee Marie Kramer*, 4 FCC Rcd 2848 (ALJ 1989) (both finalists were entitled to racial preference, therefore, this factor was not dispositive); *Perry Television, Inc.*, 4 FCC Rcd 4603 (ALJ 1989) (prevailing applicant received no integration credit and thus its claim for minority enhancement was moot; winner had superior comparative coverage); *George Henry Clay*, 4 FCC Rcd 4654 (ALJ 1989) (prevailing applicant was qualitatively better than closest competitor because it proposed auxiliary power where the other had not and had no continuing relationship with other broadcast stations in the region while the other had.); *Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310 (ALJ 1989) (winner was not the only minority applicant and minority enhancement was not dispositive); *Poughkeepsie Broadcasting Limited Partnership*, 4 FCC Rcd 6543 (ALJ 1989) (winner awarded license because it was the only applicant entitled to a full-time integration credit.); *Rayne Broadcasting Co., Inc.*, 4 FCC Rcd 6552 (ALJ 1989) (both applicants had "equal gender-minority preferences." *Id.* at 6560); *Don H. Barden*, 4 FCC Rcd 7043 (ALJ 1989) (minority enhancement was not dispositive); *Pueblo Radio Broadcasting*, 4 FCC Rcd 7802 (ALJ 1989) (prevailing applicant was only one to receive 100% management integration credit; this was dispositive factor); *Richardson Broadcasting Group*, 4 FCC Rcd 7989 (ALJ 1989) (prevailing applicant was awarded a *substantial* and *decisional* preference over" the other finalist based on the environmental impact criterion. *Id.* at 7999 (emphasis in original); the winning applicant "would [have] prevailed even without [the] minority enhancement claim." *Id.*); *Rem Malloy Broadcasting*, 4 FCC Rcd 8423 (ALJ 1989) (several applicants were

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Nonminority applicants may, and often times do, prevail over minority applicants with minority enhancement credit. For example, in *Global Information Technologies, Inc.*, 4 FCC Rcd 5445 (ALJ 1989), the ALJ granted the license to a nonminority applicant with higher management integration credits than another applicant, whose principals were of Hispanic descent. *Id.* at 5455. Furthermore, a nonminority applicant can offset a competitor's minority enhancement credit, or claim such credit for itself, by demonstrating a special sensitivity to minority viewpoints in individual cases. In *San Joaquin TV Improvement Corp.*, a nonminority applicant argued that it possessed "special sensitivity to the minority audience." 96 F.C.C.2d 594, 601 n.15. The Review Board held that a nonminority applicant was entitled to submit evidence designed "to show that any meritorious consideration of . . . [the other applicant's] minority ownership should be offset, at least, by countervailing factors." *Id.* at 601.[17] The FCC policy thus provides for precisely the type of flexible, individualized, case-by-case approach which this Court has ruled appropriate in evaluating race-conscious measures.

C. The Minority Enhancement Policy is Limited in its Duration and Places No Improper Burden on Third Parties

"equal under the minority enhancement factor and no minority preference [was] warranted." The prevailing applicant "was superior to the other applicants under the local residence factor." *Id.* at 8429. Winner was also superior in civic participation and prior broadcast experience criteria.); *WCVQ, Inc.*, 4 FCC Rcd 8554 (ALJ 1989) (several applicants received 100% minority enhancement credit); *Silver Springs Communications*, FCC 90D-4 (ALJ released Jan. 24, 1990) (prevailing applicant was only one to receive 100% management integration credit). Even in the nine remaining cases, the minority enhancement was not necessarily dispositive but played some role in the outcome.

17 *See also Chase Communications Co.*, 100 F.C.C.2d 689, 692-93 (Rev. Bd. 1985); *International Radio, Inc.*, 56 R.R. 2d 903, 931 n.120 (Rev. Bd. 1984), *review denied*, FCC 85-108 (released March 13, 1985).

In *Croson*, four members of this Court criticized theories that "could be used to 'justify' race-based decision making essentially limitless in scope and duration." *Croson*, 109 S.Ct. at 723. They rejected measures "that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* (*quoting Wygant*, 476 U.S. at 276).

Both Congress and the FCC have indicated their intention to review periodically the need for the minority enhancement policy. The appropriations bills that foreclosed FCC reconsideration of this policy extended only for one year. Thus, the policy is subject to annual Congressional review. Moreover, when Congress decides to remove the limitation on the FCC's expenditure of funds, the FCC will be statutorily bound to determine whether the policy should be discontinued because the factual basis for it has disappeared. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).[18]

In addition, consideration must be given to the effect of the FCC's policies on third parties. In *Wygant*, a plurality of this Court established a crucial difference between policies that burden society in general and those that burden individuals specifically. As Justice Powell noted:

> In cases involving valid hiring goals the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.

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18 There are cases in which the FCC has altered its rules in response to changed circumstances. *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, No. 89-312 (Jan. 8, 1990) (FCC repealed the Fairness Doctrine because it found that the underlying premise, that the fairness doctrine did not chill speech, was no longer valid); *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989) (FCC reinstated syndicated exclusivity regulations that it had previously eliminated in light of emergence of cable television as full competitor to broadcast television). In affirming the FCC's adoption or modification of policies, it is not uncommon for the court to rely on the FCC's ability to revisit its policies. *See, e.g., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1438 (D.C. Cir. 1983) (repeal of commercial guidelines).

> Denial of a future employment opportunity is *not* as intrusive as a loss of an existing job.

Wygant, 476 U.S. at 282 (emphasis added).

Since race is only "one factor in a competitive multi-factor selection system," *West Michigan*, 735 F.2d at 613, nonminorities are not excluded from competing for any licenses. No licenses are reserved or set aside for particular groups. Unlike a layoff provision that takes away a job, the preference policy does not take away an existing license. The policy is more analogous to the hiring goals which impose the least amount of intrusion. The impact on nonminorities is thus diffused among society in general, unlike the harsh layoff provisions in *Wygant*. *See supra* at n.10. Moreover, any nonminority applicant can secure the benefit of the minority enhancement by sharing ownership and control of the station with a minority group member. The *Wygant* plurality's analysis simply does not apply to the FCC's minority preference policy. Particularly in light of the individualized and flexible manner by which the policy is applied, the minimal impact on nonminorities does not warrant invalidation of the policy.

III. THIS COURT SHOULD ACCORD SUBSTANTIAL DEFERENCE TO THE FCC POLICY IN THIS CASE AND SHOULD NOT STRICTLY SCRUTINIZE THE POLICY

As demonstrated above, because it is narrowly tialored to achieve a compelling governmental interest, the FCC minority enhancement policy would pass even strict scrutiny by this Court. In fact, however, the application of strict scrutiny to this policy is wrong as a matter of principle.

A. The Text of the Fourteenth Amendment, as Well as Its Legislative History and the Intent of Its Framers, Is Flatly Inconsistent with Subjecting Congressionally Mandated Affirmative Action Measures to Strict Scrutiny

In *Croson*, this Court held that the City of Richmond's minority set-aside program was unconstitutional because it failed to satisfy the strict scrutiny required for statutes incorporating racial classifications that are enacted by states or their political subdivisions. In the course of so holding, however, Justice O'Connor's plurality opinion emphasized that a very different analysis would apply to federally mandated affirmative action measures:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Croson, 109 S.Ct. at 719 (emphasis in original).

Both the text and the legislative history of the fourteenth amendment support this dramatically different treatment of federal and state authority to adopt affirmative action measures. By its terms, the equal protection clause of the fourteenth amendment has no application to the federal government. The failure to include Congress within its ambit was hardly an oversight: The Reconstruction Congress distrusted the states and wished to curb state power regarding the treatment of the newly freed slaves. It did not distrust itself. On the contrary, as Justice O'Connor has pointed out, the primary purpose of the fourteenth amendment was to *enlarge* congressional power so as to ensure Congress' authority to adopt affirmative action measures that would protect the rights of the freedmen.

In the immediate aftermath of the Civil War, it became apparent to members of Congress that the thirteenth amendment

alone was inadequate to protect the rights of blacks. Black Codes, adopted in a number of southern states, had reestablished the substance of slavery by seriously interfering with the right of blacks to contract, to own property, and to secure access to the courts.[19] Moreover, in the view of the Radical Republicans then controlling Congress, pervasive private violence in the South was preventing the full integration of blacks into civil society — the cause for which the Civil War had been fought.[20]

Congress responded to these problems by enacting the Civil Rights Act of 1866, which, *inter alia*, granted to all citizens the same right to make and enforce contracts, sue, give evidence, acquire property and "full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens."[21] In addition, Congress attempted to expand significantly the authority of the Freedmen's Bureau, which was

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[19] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 95 (1865-66) (statement of Sen. Sumner); *id.* at 340 (statement of Sen. Wilson); *id.* at 91 (statement of Sen. Sumner); *id.* at 39 (statement of Sen. Wilson); *id.* at 41 (statement of Sen. Wilson). *See also* R. Harris, THE QUEST FOR EQUALITY 25 (1960); J. tenBrock, EQUAL UNDER LAW 180 (1965).

[20] *See* H.R. Rep. No. 30, 39th Cong., 1st Sess., Serial 1273 (1866) (*cited in* J. tenBrock, EQUAL UNDER LAW 204 (1965)). For examples of violence noted by members of Congress *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 95, 168, 339, 340, 503 (1865-66); for a compilation of the testimony presented to the Joint Committee on Reconstruction *see* L. Warsoff, EQUALITY AND THE LAW 109-10 (1938); *see also* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354 n. 12 (1963-64).

[21] An Act to Protect All Persons in the United States in their Civil Rights, and Furnish Means of their Vindication, 14 Stat. 27 (1886). *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 438 (1865-66) (statement of Sen. Howe); Cong. Globe, 39th Cong., 1st Sess. 321-23 (1865-66) (statement of Sen. Trumbull); *see also* R. Harris, THE QUEST FOR EQUALITY 25 (1960); H. Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT, 11-54 (1908).

designed to provide special aid for blacks in their struggle to overcome the heritage of slavery and become full citizens.[22]

It is important to understand that these laws were the nineteenth century analogue of modern affirmative action measures. They were intended to deal with the unique problems of racial minorities and to provide them with special protections.[23] As an opponent of the Freedmen's Bureau legislation argued to his colleagues, "This present bill is to secure the protection of the Government to the blacks exclusively, notwithstanding the apparent liberality of the measure to all colors and classes . . . . [It] will plainly be seen that black freedmen and not white refugees were the special care of the bureau." Cong. Globe, 39th Cong, 1st sess., Appendix at 78-79 (statement of Rep. Chanler).

The Congress that enacted these measures was distrustful not only of the states, but also of the federal judiciary. Indeed, the immediate impetus for the fourteenth amendment was the desire to curb the power of the courts so as to shield the newly enacted legislation from judicial attack. One commentator describes the backdrop against which the fourteenth amendment was enacted as follows:

> Former Abolitionists had not forgiven the Supreme Court for its decision in the *Dred Scott* case or for Chief

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22 *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 77 (1865-66) (statement of Sen. Trumbull); *id.* at 1088 (statement of Rep. Woodbridge); Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 Conn. L. Rev. 237 (1982); *National Anti-Slavery Standard*, June 3, 1865 (*cited in* E. Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 258-59 (1988)). "The Freedmen's Bureau had already taken steps to protect these rights [The Bill of Rights], and the amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866." E. Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 258-59 (1988).

23 *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 43 (1865-66) (statement of Sen. Trumbull); *id* at 74 (statement of Rep. Stevens); *id* at 438 (statement of Sen. Howe); *id* at 77 (statement of Sen. Trumbull); *id* at 90-91 (statement of Sen Sumner); *see also* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1363-67 (1963-64).

> Justice Roger B. Taney's circuit court opinion in *Ex parte Merryman* . . . . The hostility of Radicals to the Court was intensified by Chief Justice Salmon P. Chase's refusal to hold circuit court in states under martial law, thereby preventing the trial of Jefferson Davis, and the fears that their reconstruction policies would be invalidated.
>
> After the submission of the proposed amendment, congressional Radicals and their journalistic allies were successively infuriated by the decision in *Ex Parte Milligan* ... which rescued a "Copperhead" from a well-deserved hanging, by the Court's temerity in merely hearing without deciding a case challenging the validity of the Reconstruction Act, . . . [and] the Court's invalidation of the test oath in *Garland*.

R. Harris, THE QUEST FOR EQUALITY 54 (1977) (footnotes omitted).

As originally proposed by Congressman Bingham, the fourteenth amendment consisted solely of what is now section five, granting authority to Congress to enforce equality through appropriate legislation. *See* Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1865-66) (statement of Rep. Bingham). Speaker after speaker defended the amendment as necessary to ensure the constitutionality of the recently enacted reconstruction legislation. Although the self-executing provisions of the amendment were later added, the amendment's supporters made clear that their primary intent was to safeguard congressional power from judicial overreaching.[24]

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24 "I regard as very doubtful, to say the least," said Henry J. Raymond, conservative Republican from N.Y., "whether Congress, under the existing Constitution, had any power" to enact The Civil Rights Bill. "Now, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it." Cong. Globe, 39th Cong., 1st Sess. 2502 (1865-66). *See also* statements of Stevens at 2459; Boyer at 2467; Kelley at 2468; Bromall at 2498; Spalding at 2509; Eliot at 2511; Eckley at 2534; Farnsworth at 2539; Poland at 2961. *See also* R. Harris, THE QUEST FOR EQUALITY 35 (1977); J.

continued

In light of this history, judicial strict scrutiny and invalidation of the federal government's minority enhancement policy would turn the fourteenth amendment on its head. It would convert a grant of authority to Congress to enact affirmative action measures into a grant of authority to the judiciary to strike them down.[25]

This Court has recently decried the use of judicial power to invalidate measures enacted by the politically responsive branches of government in circumstances where there is no textual support for judicial intervention. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution"). *See also Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 787 (1986) (White, J., dissenting) ("[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.")

As demonstrated above, there is *no* support in either the text or legislative history of the fourteenth amendment for the

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tenBroek, EQUAL UNDER LAW 224 (1965); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 Wash. Univ. L.Q. 421, 441 n. 56; J. James, THE FRAMING OF THE FOURTEENTH AMENDMENT 184 (1956); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1356 (1963-64).

[25] The Supreme Court has traditionally "'accorded great weight to the decisions of Congress'" when Congress acts under its power to enforce the equal protection clause. *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1973). Congressional insistence on maintaining the minority preference policy has been unambiguous and forceful. In 1987, the FCC suggested that it was considering abandoning the policy. Congress expressly found that "promoting minority ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming," S. Rep. No. 100-182, 100th Cong., 1st Sess. 76 (1987), and prohibited the reconsideration. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). *See also* Pub. L. No. 100-459, 102 Stat. 2216 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

proposition that Congress lacks the authority to enact affirmative action measures. This Court's refusal in cases such as *Bowers v. Hardwick*, 478 U.S. 186 (1986), to overturn political judgments in the absence of textual authority is therefore fully applicable here. Indeed, this is a far stronger case than *Bowers* for judicial abstention. Although the *Bowers* majority found nothing in the constitutional text that justified judicial intervention, neither was there anything in the text that precluded it. In contrast, petitioners ask this Court to invalidate the federal government's minority enhancement policy not only in the absence of textual authority for judicial intervention, but *in the face of a constitutional provision enacted specifically so as to prohibit such intervention.* If this Court were to follow that course, it would effectively render the considered decision of the Reconstruction Congress a nullity.

B. This Court's Decision in *Bolling v. Sharpe*, Subjecting Legislation Discriminating against a Racial Minority to Strict Scrutiny under The Fifth Amendment, Is Inapplicable to Affirmative Action Measures

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), this Court held that even though the equal protection clause of the fourteenth amendment was inapplicable to the federal government, discrimination against racial minorities might be "so unjustifiable" as to violate the due process clause of the fifth

Bolling suggests that the Court intended to cut back on Congress' power under section five of the fourteenth amendment to enforce the equality rights of racial minorities. Moreover, although *Bolling* has been held applicable to discrimination against other minority groups,[26] this Court has never held that the *Bolling* principle mandates strict scrutiny for federal affirmative action measures. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980) (strict scrutiny inapplicable to federal affirmative action programs). For reasons outlined above, such a holding would contravene the fourteenth amendment, which was specifically designed to authorize such measures. Moreover,

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[26] *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1970) (aliens); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimate children).

such a holding would be flatly inconsistent with Justice O'Connor's plurality opinion in *Croson*.

In *Croson*, Justice O'Connor expressly stated that pursuant to its authority under section five of the fourteenth amendment, Congress could constitutionally enact affirmative action measures that would be unconstitutional if enacted by the states or their subdivisions. *Croson*, 109 S.Ct. at 719-20. In the course of so holding, she relied upon *Katzenbach v. Morgan*, 384 U.S. 641 (1966), wherein the Court recognized Congress' independent authority to adopt reasonable measures designed to enforce the fourteenth amendment. *Croson*, 109 S.Ct. at 719.

In *Morgan*, the Court made clear that although section five of the fourteenth amendment granted Congress the authority to enforce equality principles, it did not "grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'" *Morgan*, 384 U.S. at 651 n.10. Superficially, it might appear that the *Croson* plurality opinion is inconsistent with *Morgan's* "one way ratchet." The holding of *Croson* was that the plaintiff's individual equality right had been violated by Richmond's affirmative action plan. If there were also such a right vis-a-vis the federal government, permitting Congress to enact a similar plan would "dilute equal protection . . . decisions of this Court."

Croson can be reconciled with *Morgan* only by recognizing that the right vindicated by the *Croson* Court was a right enjoyed against the states and their subdivisions and not a right enjoyed against the federal government. For this reason, recognition of congressional power to enact the very same affirmative action measure that is beyond the power of the states involves no dilution of equality rights. Thus, Justice O'Connor's opinion in *Croson* implicitly read *Bolling* as inapplicable to affirmative action measures designed to benefit racial minorities. Because *Bolling* leaves Congressional authority to enforce the fourteenth amendment for the benefit of racial minorities untouched, this Court should not strictly scrutinize a measure enacted pursuant to that authority.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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